Supreme Court of the United States

OCTOBER TERM, 1966

No. 673

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ESTATE OF HERMAN J. BOSCH, DECEASED, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. A]

In the United States Court of Appeals for the Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

APPENDIX B TO THE BRIEF FOR THE PETITIONER

[fol. 1]

TAX COURT OF THE UNITED STATES

DOCKET NO. 89110

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR, One Wall Street, New York 5, NEW YORK, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

APPEARANCES FOR PETITIONER:

John A. Clark, Esq.,
c/o Davies, Hardy & Schenck
Two Broadway
New York 4, New York 10004

GENERAL DOCKET ENTRIES

Date			Filings and Proceedings
Month	Day	Year	
Sept.	14,	1960	PETITION FILED: FEE PAID 9/14/60, Served Sept. 14, 1960
Oct.	14,	1960	ANSWER filed by resp.
Oct.	14,	1960	REQUEST by resp. for trial at New York, N.Y. Action Granted 10/17/60.
Dec.	3,	1962	ORDER calendaring case for special trial status report, March 4, 1963, New York, N.Y., Served Dec. 3, 1962
Mar.	4,	1963	HEARING at New York, N.Y. by Judge Train Report on Trial Status.

Date			Filings and Proceedings
Month	Day	Year	
Mar.	15,	1963	TRANSCRIPT of proceedings of March 4, 1963 received.
Mar.	16,	1964	ORDER, that case is calendared for Special Session on May 18, 1964 at New York, N. Y. for status report. Served Mar. 19, 1964
Apr.	14,	1964	JOINT MOTION to place case on trial calendar on June 1, 1964 at New York, N. Y. Action Granted 4/15/64, Served Apr. 16, 1964
Apr.	16,	1964	NOTICE of Trial at New York, New York, June 1, 1964. Served Apr. 16, 1964
June	1,	1964	TRIAL at New York, N.Y. by Judge Raum Submitted on Stipulation of Facts. Stipulation of Facts with joint exhibits filed. Petr. Brief due July 16, 1964, Resp. Brief in answer due August 17, 1964. Petr. Brief in reply due September 1, 1964.
[fol. 2]			
			UNDER SUBMISSION—JUDGE RAUM
June	17,	1964	TRANSCRIPT of Trial of June 1, 1964 received.
July	16,	1964	MOTION by petr. (No. Objec. by resp.) to extend time for filing petr's brief from July 16, 1964 to July 30, 1964. Action Granted July 17, 1964, Served July 20, 1964.
July	22,	1964	ORIG. BRIEF filed by petitioner. 20 p. copies, Served Jul 22, 1964
Aug.	31,	1964	BRIEF IN ANSWER filed by respondent. Served Sept. 2, 1964
Sept.	11,	1964	BRIEF IN REPLY filed by petr. (Perm. to file) 20 P. copies. Served Sep 14, 1964
Nov.	3,	1964	OPINION filed, Judge Raum. Decision will be entered under Rule 50. Served Nov. 3, 1964
Jan.	28,	1965	AGREED COMPUTATION filed.
Feb.	2,	1965	DECISION entered, Judge Raum. Served Feb. 2, 1965
			APPELLATE PROCEEDINGS
Apr.	30,	1965	PETITION FOR REVIEW by USCA 2nd Cir. filed by Resp. Served 4/30/65
Apr.	30,	1965	NOTICE OF FILING Petition for Review sent to counsel for petr. Served 4/30/65
Apr.	30,	1965	ORDER enlarging time for filing record on review to July 29, 1965. Served 4/30/65
Apr.	30,	1965	NOTICE of Extension of Date of Transmission of record on review to the parties. Served 4/30/65
May	4,	1965	PROOF OF SERVICE of petition for review filed.

[fol. 3]

BEFORE THE TAX COURT OF THE UNITED STATES

Docket No. 89110

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PETITION—Filed Sept. 14, 1960

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated June 20, 1960, and as a basis of its proceeding alleges as follows:

1. The petitioner is a fiduciary with its principal office at One Wall Street, New York 5, New York. The return for the estate here involved was filed with the District Director for the Upper Manhattan District of New York.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on June 20, 1960.

3. The deficiency as determined by the Commissioner is in estate tax in the amount of $26,958.77 of which approximately $26,274.68 is in dispute.

[fol. 4] 4. The determination of the tax set forth in the said notice of deficiency is based upon the following errors:

a. The Commissioner erred in determining that the corpus of the inter vivos trust created by the decedent on April 9, 1930, which had a fair market value of $70,222.04 at the alternate valuation date, does not qualify for the marital deduction under Section 2056 of the Internal Revenue Code of 1954.

b. The Commissioner erred in disallowing $32,803.92 of the marital deduction, thereby reducing said deduction from the amount of $749,492.34 as shown on the estate tax return to the amount of $716,688.42.

c. The Commissioner erred in failing to determine that the marital deduction should be increased to $752,217.76 from the $749,492.34 shown on the estate tax return.

d. The Commissioner erred in failing to allow as a credit against the Federal Estate Tax, estate taxes paid to the State of New York in the amount of at least $14,431.92.

5. The facts upon which the petitioner relies as a basis for the proceeding are as follows:

a. The decedent, Herman J. Bosch, died on April 6, 1957.

b. On July 7, 1958, the petitioner filed the Federal Estate Tax Return on form 706 for the estate of the decedent, which showed a tax to be due of $148,363.26, with the District Director of Internal Revenue for the Upper Manhattan District of New York. On July 6 and July [fol. 5] 7, 1958, the petitioner paid $148,737.18 on account of the tax shown to be due on the return.

c. On April 9, 1930, the decedent created a trust which provided for the payment of the income therefrom to the decedent's wife, Margaret Bosch, for her life with a reversion to the grantor if his wife should predecease him, or to his estate if he should predecease his wife leaving a will or to his next of kin if he should die intestate. The trust also contained provisions which reserved to the grantor the right to alter or amend the trust at any time during his life with the consent of the trustee and the further right, without the consent of the trustee or any other person, to revoke the trust in whole or in part. A copy of said trust is attached hereto and marked Exhibit B.

d. On February 6, 1931, the decedent exercised his right, with the consent of the trustee, to amend the April 9, 1930 trust in order to provide that his wife should have a general power of appointment over the property of the trust exercisable by will if she should survive the grantor

and in default of such appointment, one-half to his next of kin and one-half to her next of kin. The power in the grantor to further alter, amend or revoke the trust during his lifetime was undisturbed by this amendment. A copy of said amendment dated February 6, 1931 is attached hereto and marked Exhibit C.

e. On October 25, 1951, the decedent's wife, Margaret Bosch, executed an instrument by which she purported to effect a partial release of the general power of [fol. 6] appointment granted to her by the April 9, 1930 trust as amended. A copy of said instrument is attached hereto and marked Exhibit D. It is the position of the petitioner that the purported partial release was a nullity so the corpus of the trust, being subject to a general power of appointment in the decedent's wife at the time of the decedent's death, qualifies for the marital deduction under Section 2056 of the Internal Revenue Code of 1954.

f. Including the corpus of the April 9, 1930 trust, the total value of property passing to the decedent's wife, which qualifies for the marital deduction, is $786,910.46.

g. Adjustments made by the Commissioner to which the petitioner has agreed have resulted in increasing the value of the adjusted gross estate, as defined in Section 2056 (c) (2) of the Internal Revenue Code of 1954, to $1,504,435.51 from the $1,498,984.68 reported on the estate tax return for said Estate.

h. As a result of the said agreed adjustments, the maximum marital deduction, which is deductible in computing the value of the net estate for Federal estate tax purposes, is increased from the amount of $749,492.34 as shown on the estate tax return for said Estate to the amount of $752,217.75.

WHEREFORE, the petitioner prays that this Court may hear the proceeding and determine that the deficiency in estate tax due from the petitioner should not be in excess of $684.09.

/s/ JOHN A. CLARK
Counsel for Petitioner
JOHN A. CLARK
c/o Davies, Hardy & Schenck
Two Broadway,
New York 4, New York

Of Counsel:

DERMOD IVES
ROBERT D. TAISEY
MARILYN WALSH

[fol. 7]

[Duly Sworn to by John F. McIlwain
Jurat Omitted in Printing]

[fol. 8]

EXHIBIT A TO PETITION—Notice of Deficiency

June 20, 1960

Estate of Herman J. Bosch
Irving Trust Company, Executor
One Wall Street
New York 5, New York

* * * *

EXPLANATION OF ADJUSTMENTS

* * * *

	Returned	Determined
Marital deduction	$749,492.34	$716,688.42
Adjustment		$32,803.92

It is held that the corpus of an inter vivos trust created by the decedent on February 6, 1931, which has a fair market value of $70,222.04 at the alternate valuation date, does not qualify for the marital deduction within the purview of section 2056 of the Internal Revenue Code of 1954.

It is further held that marital deduction in the amount of $716,688.42 is allowable, computed as follows:

Gross estate as corrected	$1,622,014.43
Less: Schedules J and K items	117,578.92
Adjusted gross estate as corrected	$1,504,435.51
Less: Nontestamentary property	91,806.32
Net testamentary estate	$1,412,629.19
One-half net testamentary estate	$ 706,314.59
Less: Legacies to widow	48,026.00
Martial trust	$ 658,288.59
Property outside will qualifying for marital deduction	10,373.83
Legacies to widow	$ 668,662.42
	48,026.00
Marital deduction	$ 716,688.42

* * * *

[fol. 9]

BEFORE THE TAX COURT OF THE UNITED STATES

* * * *

ANSWER—Filed Oct. 14, 1960

THE RESPONDENT for answer to the petition filed in the above-entitled case admits and denies as follows:

1, 2, 3. Admits the allegations of paragraphs 1, 2 and 3 of the petition.

4. a,b,c,d. Denies the respondent erred as alleged in subparagraphs a,b,c,d, inclusive, of paragraph 4 of the petition.

5. a,b,c,d. Admits the allegations of subparagraphs a,b,c,d, inclusive, of paragraph 5 of the petition.

e. Admits that on October 25, 1951, decedent's wife, Margaret Bosch, executed an instrument. Denies the remaining allegations contained in subparagraph e of paragraph 5 of the petition.

f. Denies the allegations contained in subparagraph f of paragraph 5 of the petition.

g. Admits the allegations contained in subparagraph g of paragraph 5 of the petition.

h. Denies the allegations contained in subparagraph h of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

[fol. 10] WHEREFORE, it is prayed that the appeal be denied and the determination of the respondent be in all things approved.

/s/ HART H. SPIEGEL
HART H. SPIEGEL
Chief Counsel
Internal Revenue Service

OF COUNSEL:

WM. V. CROSSWHITE
Regional Counsel
PHILIP SHURMAN
Special Attorney
Internal Revenue Service
90 Church Street
New York 7, New York

[fol. 11]

BEFORE THE TAX COURT OF THE UNITED STATES

* * * *

STIPULATION—Filed June 1, 1964

It is hereby stipulated and agreed between the Commissioner of Internal Revenue and the above entitled taxpayer, by their respective undersigned attorneys, that the following facts shall be taken as true and all exhibits referred to herein are incorporated in this stipulation and made a part hereof, provided, however, that this stipulation does not waive the right of either party to introduce other evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any such facts on the grounds of immateriality or irrelevancy.

1. The decedent, Herman J. Bosch, died testate a resident of the State of New York on April 6, 1957.

2. The petitioner, Irving Trust Company, was named the executor of the will of Herman J. Bosch and was duly qualified as such before the Surrogate's Court of Westchester County.

3. On July 7, 1958, the petitioner filed the Federal Estate Tax Return on Form 706 for the estate of the decedent which showed a tax to be due of $148,363.26, with the Director of Internal Revenue for the Upper Manhattan District. On July 6, and July 7, 1958 the petitioner paid $148,737.18 on account of the tax shown to be due on this return.

[fol. 12] 4. On November 17, 1958 the petitioner made a payment in the amount of $13,500.00 to the said Director of Internal Revenue.

5. On April 9, 1930 the decedent created a trust. The Irving Trust Company was named the trustee of said trust. A copy of said trust agreement is attached hereto and marked Exhibit 1-A.

6. On February 6, 1931 the decedent executed an instrument amending the said trust agreement, a copy of which is attached hereto and marked Exhibit 2-B.

7. In October of 1951 the Irving Trust Company as trustee of the trust communicated with the decedent and

Margaret Bosch pointing out the provision in the trust agreement for a general power of appointment exercisable by will which had been granted to Margaret Bosch and suggesting that they might wish to take necessary steps to eliminate the said power of appointment assigning as the reason therefor to prevent the assets of the trust being taxed as part of Margaret Bosch's estate. A copy of a letter dated October 16, 1951 from Marion Quell of Irving Trust Company to Mrs. Margaret Bosch is attached hereto and marked Exhibit 3-C. A copy of a memorandum dated October 19, 1951 and initialled by Miss Quell is attached hereto and marked Exhibit 4-D.

8. On October 25, 1951, Margaret Bosch executed an instrument, a copy of which is attached hereto and marked Exhibit 5-E.

[fol. 13] 9. The Irving Trust Company as trustee of said trust filed a petition dated January 25, 1963 with the Supreme Court of the State of New York, County of Nassau. The said Court issued an order to show cause upon the said petition in which it designated Zola A. Aronson as guardian ad litem of an infant respondent. A copy of the petition and order to show cause is attached hereto and marked Exhibit 6-F.

10. The event which prompted the Irving Trust Company as trustee to petition for the allowance of its intermediate account and for a determination as to the validity of the October 25, 1951 instrument was the determination by the Internal Revenue Service that the October 25, 1951 instrument was effective to reduce the general power of appointment in Margaret Bosch which was provided in the February 6, 1931 amendment to the trust agreement to a special power and accordingly, that the principal of the trust did not qualify as a part of the marital deduction in the decedent's estate.

11. On March 14, 1963, Margaret Bosch made a motion in the Supreme Court of the State of New York, County of New York to have the place of trial on the petition for accounting and construction changed from Nassau County to New York County. This motion was subsequently granted over the objection of the guardian ad litem Zola A. Aronson.

12. Briefs with respect to the question of the validity of the October 25, 1951 instrument were filed with the court by the Irving Trust Company as trustee (Exhibit 7-G), Margaret Bosch as a respondent (Exhibit 8-H) and Zola A. Aronson as guardian ad litem of Peter Bosch an [fol. 14] infant respondent (Exhibit 9-I).

13. On November 8, 1963, Judge Irwin D. Davidson of the Supreme Court for New York County issued an opinion containing his determination as to the validity of the October 25, 1951 instrument. A copy of said opinion is attached hereto and marked Exhibit 10-J.

14. On January 3, 1964, the judgment of the Supreme Court for New York County was rendered by Judge Davidson allowing the account of the Irving Trust Company as trustee of the trust and rendering the final determination of the court as to the validity of the October 25, 1951 instrument. A copy of said judgment is attached hereto and marked Exhibit 11-K.

/s/ JOHN A. CLARK
Counsel for Petitioner

/s/ SHELDON S. COHEN
SHELDON S. COHEN
Chief Counsel
Internal Revenue Service

[fol. 15]

BEFORE THE TAX COURT OF THE UNITED STATES

* * * *

PROCEEDINGS

THE CLERK: Docket No. 89110, Estate of Herman J. Bosch.

Will counsel state their appearances, please.

APPEARANCES

MR. CLARK: John A. Clark for the petitioner.

MR. SHURMAN: Philip Shurman for the respondent.

May it please the Court, at this time I would like to file the joint stipulation of facts which contains Joint Exhibits 1-A through 11-K.

THE COURT: I will receive it.

(The stipulation of facts and Joint Exhibits 1-A through 11-K for identification were received in evidence.)

OPENING STATEMENT ON BEHALF OF PETITIONER

By Mr. Clark

MR. CLARK: If it please the Court, this matter involves the estate taxes on the estate of Herman J. Bosch. Specifically involved is a trust which the decedent created in 1930. The provisions of this trust gave the income to the wife, to the decedent's wife, for her lifetime with the remainder over after her death to the decedent or his estate.

The decedent by the terms of the trust retained the unqualified right to alter, amend or revoke the trust at [fol. 16] any time prior to his death. Because of this retained right, there is no question as to the includability of this trust in the decedent's gross estate.

This whole question here involved is whether or not this trust qualifies for the marital deduction in the decedent's estate.

In 1931 the decedent exercised his right of amendment and provided in the trust that if his wife survived him, that is, if the decedent predeceased his wife, his wife would thereafter have a general power of appointment over the trust property exercisable by her will. There were gifts over in default of an appointment in the event that the wife did not exercise her power of appointment.

This was the only amendment that the decedent ever made to the subject trust.

In 1951 the decedent's wife, just before the expiration of the time limitation contained in the powers of appointment act of 1951 executed an instrument by which she purported to limit the power of appointment contained in the trust agreement to a special power of appointment.

Our question specifically presented here is as to the effectiveness and validity of this 1951 instrument. It is the petitioner's position that this 1951 instrument was under New York law a nullity and wholly ineffective to cut down the general power of appointment contained in the trust instrument to a special power.

Accordingly, it is our position that a general power of appointment in the wife still exists or still existed at the [fol. 17] date of the decedent's death and accordingly that the trust qualifies for the marital deduction.

The respondent's position, of course, is that the 1951 instrument was effective; that it cut down the general power to a special power, and, accordingly, that the marital deduction should not be allowed for the assets of the trust.

The petitioner's position in this respect is based upon section 183 of the New York Real Property Law. This section of the New York law provides in effect that a power which is exercisable—and I want to place emphasis upon the use in the statute of the word "exercisable"—is realizable by an instrument properly executed.

Under the trust as it was set up by the amendment in 1931, the wife's general power of appointment here was not exercisable until the appointment at which the decedent predeceased her. In 1951, when she purported to partially release this general power of appointment, the decedent was still alive. Accordingly, the power, as con-

tained in the trust agreement, was still in an inchoate state and had not yet become exercisable by the wife.

Accordingly, under section 183, the requirements of that section for a power to be realizable had not yet been fulfilled and, accordingly, the instrument which the wife executed in 1951 purporting to release those, that power, was a nullity because it did not fulfill the requirements of the New York statutory law.

Following the Commissioner's determination that this [fol. 18] trust did not qualify for the marital deduction, the trustee, in order to get an official determination of the status of the power of appointment, petitioned the New York Supreme Court for a construction of the trust agreement, presenting specifically to that court for determination the question as to the validity of the 1951 instrument which the wife executed.

The New York Supreme Court duly considered this question and published a rather detailed opinion on it, which is contained in the stipulation of fact, by which the court found that the 1951 instrument was a nullity; that it was wholly ineffective to affect the power of appointment contained in the original instrument, and based its conclusion thereon on section 183 of the New York Real Property Act.

Accordingly, the first question which this Court would have to address itself to would be the weight to be accorded to the decision of the New York Supreme Court rendered upon that construction provision which was brought by the trustee. It is the petitioner's position on this question that the decision of the New York Supreme Court is binding upon this Court as it pertains to a matter of local New York law in a determination of the validity of this 1951 instrument.

THE COURT: Who were the parties in that case?

MR. CLARK: All of the parties of interest in the trust, all of the beneficiaries—as a matter of fact, there was a special guardian for some of the remaindermen or some of the contingent remaindermen. All parties in interest in the trust were cited in that proceeding. Briefs [fol. 19] were filed by the trustee, by the attorney for the life beneficiary and by the special guardian. I might point

out, anticipating the respondent's pointing it out for me, that all these briefs took the same tack or presented the same side of the argument, that this 1951 instrument was a nullity and ineffective to cut down the general power of the appointment.

However, we feel that that does not militate against the situation of the determination of the local court being binding. What we are involved with here is not a mere consent decree as to the distribution of property in an estate, but with a considered opinion by a court of New York State determining a question of local law which ultimately fixed the rights of the parties as that law involved them.

THE COURT: Was the proceeding non-adversary in the sense that no one had any interest in the court's coming out one way or the other?

MR. CLARK: You might say that that's correct, your Honor. In effect nobody raised a dissenting voice in these proceedings. However—and here we get to a point of law which is slightly muddled, depending on where you happen to be in the United States—under the situation with which we are presented here, in the Third Circuit there are cases there which claim or hold that where an issue of local law is directly presented to the Court, the Court duly considers it, presents itself to it, and makes a finding on that basis, particularly in a situation such as we have here [fol. 20] of a detailed published opinion which could be used as precedent for that interpretation of the New York law, that that is a determination which is binding upon the federal courts on the basis that no local judge would prostitute himself to the point of making a pronouncement as to the interpretation of local law in a legal question merely for the purpose of accommodating parties to the cause.

COLLOQUY BETWEEN COURT AND COUNSEL

THE COURT: Is this the sole question in the case, then, whether the state court decree in this matter is binding?

MR. CLARK: I might mention on that, your Honor—

MR. HURMAN: That is a collateral issue.

MR. CLARK: That would be the first thing, it would seem to me, that the Court should address itself. Of course if the Court finds that this local law, this local decree is binding, then that determines the issue.

THE COURT: That would be the end of the case?

MR. SHURMAN: Yes, your Honor. If it is binding on this Court.

MR. CLARK: That's right.

MR. SHURMAN: The local decision is binding on the parties but not on this Court nor on respondent.

MR. CLARK: Of course, if this Court should determine that the decision of the New York Supreme Court is not binding upon it, then it would have to go as a second matter to address itself to the interpretation of New York law as to the validity of this 1951 instrument and [fol. 21] its effectiveness to cut down the general power of appointment to a special power.

MR. SHURMAN: The only thing that I can add, your Honor, is that it is respondent's position that the interest of the decedent's surviving spouse, both at the time of this decedent's death and at all times after October 25, 1951 was such an interest which would not qualify for the marital deduction; in other words, the wife's interest at that particular time and after October 25, 1951, did not give her any power, any general power of appointment. She did have it and gave it up. So as of the date of the decedent's death, not having a general power of appointment but merely a life estate, that interest will not qualify for the marital deduction.

It is also respondent's position, in so far as the decision of the Supreme Court is concerned, that the Supreme Court decision was issued in a non-adversary proceeding, not one of the parties was in any way affected by the outcome that the parties were looking forward to; it is also respondent's position that the Supreme Court decision is wrong as a matter of law, both as to basic law, as to the law of the State of New York, and it also is contrary to decisions of this Court and the Court of Appeals.

THE COURT: Has the time elapsed for an appeal in that New York State decision?

MR. CLARK: I believe it is.

MR. SHURMAN: Yes, your Honor.

THE COURT: And no appeal was taken.

[fol. 22] MR. CLARK: No appeal was taken.

THE COURT: Does that appear in the stipulation of facts here?

MR. SHURMAN: I believe it does. I think we covered that. I would say yes, your Honor, that the time for the appeal has expired.

MR. CLARK: No, we do not.

MR. SHURMAN: No, I think we left it out.

MR. CLARK: It is not so stated there.

THE COURT: Do you wish to stipulate now?

MR. CLARK: I would stipulate that no appeal was taken and to the best of my knowledge—I am sure that the time for filing an appeal would have expired by now.

MR. SHURMAN: That's correct, your Honor.

THE COURT: Do you so stipulate?

MR. CLARK: I so stipulate.

THE COURT: Very well.

Off the record.

(Discussion off the record.)

* * * *

[fol. 23] 43 T. C. No. 11

BEFORE THE TAX COURT OF THE UNITED STATES

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 89110

Filed November 3, 1964

Held, in the circumstances of this case decision of Supreme Court of New York is accepted as an authoritative adjudication in respect of widow's power of appointment over remainder interest in trust with the consequence that marital deduction is allowed.

John A. Clark, for the petitioner.

Philip Shurman, for the respondent.

OPINION—Nov. 3, 1964

RAUM, *Judge*: The Commissioner determined an estate tax deficiency in the amount of $26,958.77 in respect of the estate of Herman J. Bosch, who died on April 6, 1957, a resident of New York. At issue is whether his surviving spouse's interest in an inter vivos trust created by him qualifies for the marital deduction. The facts have been stipulated.

Bosch created the trust in question on April 9, 1930, to pay the income therefrom to his wife for her life, and upon her death to deliver the corpus to the grantor or his estate. He reserved the right to alter, amend, or revoke,[1] and, pursuant thereto, he amended the trust only once, on February 6, 1931. Under the amendment, his wife continued to be the life beneficiary, and in addition was given

[1] The power to alter or amend was conditioned upon the consent of the trustee, but the power to revoke was absolute.

[fol. 24] a general power to appoint the remainder by will. The trust thereafter remained subject to his continuing power to alter, amend, or revoke.

On October 25, 1951, in order to prevent the corpus of the trust from being included in *her* gross estate, Bosch's wife executed an instrument purporting to make an irrevocable release of a portion of that power of appointment and thus to convert it into a special power of appointment.[2]

If that release were effective, it is not disputed by petitioner that no marital deduction would be available to the estate in respect of the trust by reason of Section 2056(b)(5), I.R.C. 1954.[3] On the other hand, the Government

---

[2] She released merely the power to appoint "in favor of myself, my estate, my creditors or the creditors of my estate", thereby retaining the power to appoint to all others. The parties are not in disagreement that such remaining broad power is to be classified as a special power.

[3] Section 2056(b)(5) provides:

> (b) Limitation in the Case of Life Estate or Other Terminable Interest.—
>
> * * * * * * *
>
> (5) Life Estate with Power of Appointment in Surviving Spouse.—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—
>
> (A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and
>
> (B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.
>
> This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

does not challenge the right to the marital deduction if [fol. 25] the 1951 attempted partial release were ineffective, thus leaving the trust as providing for a life estate in the grantor's wife together with a general power of appointment over the remainder.

After commencement of the present litigation, and at least in part for the purpose of affecting its outcome, the trustee, on January 25, 1963, filed a petition with the Supreme Court of the State of New York, seeking a determination as to the effectiveness of Mrs. Bosch's 1951 instrument of partial release. An order to show cause was issued, directed to Mrs. Bosch and some 23 other persons, who were possible beneficiaries in the event of Mrs. Bosch's death without exercising her power of appointment. The order also appointed a guardian ad litem for one of those persons, who was an infant. Three briefs were filed in that proceeding, one in behalf of the trustee, the second in behalf of Mrs. Bosch, and the third by the guardian ad litem in behalf of the infant. All three briefs argued that under New York law Mrs. Bosch's attempted partial release in 1951, while her husband was still alive and had an unlimited power of revocation, was a nullity. [fol. 26] No argument to the contrary was presented to the New York court, which rendered an opinion adopting the position maintained in the three briefs before it,[4] *Matter of Bosch*, N.Y.L.J., November 15, 1963 (New York Sup. Ct., Special Term), and thereafter, on January 3, 1964, entered judgment in accordance with that opinion.

If the decision of the New York court is to be accepted here that would be the end of the present controversy, for the decedent's wife would be regarded as having a general power of appointment coupled with her life estate, and in such circumstances there is no dispute that the contested marital deduction would be available.

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[4] The position urged upon the New York court which it adopted was in substance that under New York law a power of appointment created by will could not be exercised (or released) during the testator's lifetime because the will is ambulatory and could be revoked by him at any time, and that petitioner's attempt to release her testamentary power of appointment during her husband's lifetime was likewise a nullity since the entire trust was subject to his unfettered power of revocation until the date of his death.

In general, where the operation of the Federal tax law turns upon the nature of property interests created under state law, an adjudication by a state court in respect of the very property interests involved "is final" where that court has jurisdiction over the subject matter and the proceeding is not collusive. *Blair* v. *Commissioner*, 300 U.S. 5, 10. Cf. *Freuler* v. *Helvering*, 291 U.S. 35; *Sharp* [fol. 27] v. *Commissioner*, 303 U.S. 624, reversing 91 F. 2d 802 (C.A. 3). However, it has also been held in an impressive number of cases that where the state court proceeding is nonadversary, the decision is not necessarily binding. E.g., *Estate of M. G. Pierpont* v. *Commissioner*, 336 F. 2d 277 (C.A. 4); *First Nat. Bank of Montgomery* v. *United States*, 285 F. 2d 123 (C.A. 5), affirming 176 F. Supp. 768 (D. Ala.); *Newman* v. *Commissioner*, 222 F. 2d 131, 136 (C.A. 9), affirming 19 T.C. 708; *Wolfsen* v. *Smyth*, 223 F. 2d 111 (C.A. 9); *Saulsbury* v. *United States*, 199 F. 2d 578, 580-581 (C.A. 5); *Faulkerson's Estate* v. *United States*, 301 F. 2d 231 (C.A. 7), certiorari denied, —— U.S. ——; *Brainard* v. *Commissioner*, 91 F. 2d 880, 883-884 (C.A. 7), certiorari dismissed, 303 U.S. 665; *Tatem Wofford*, 5 T.C. 1152; *Estate of Howard E. Stevens*, 36 T.C. 184, 193-194. The law in this field is highly confusing, cf. *Merchants National Bank & Trust Co.* v. *United States*, 246 F. 2d 410, 417 (C.A. 7); *Channing* v. *Hassett*, 200 F. 2d 514, 518 (C.A. 1), and, notwithstanding various efforts to spell out distinctions and rationalizations, a number of other cases appear to have reached opposite conclusions in seemingly comparable circumstances. E.g., *Flitcroft* v. *Commissioner*, 328 F. 2d 449 (C.A. 9), reversing 39 T.C. 52; *Darlington's Estate* v. *Commissioner*, 302 F. 2d 693 (C.A. 3), reversing 36 T.C. 599; *Beecher* v. *United States*, 280 F. 2d 202 (C.A. 3); *Gallagher* v. *Smith*, 223 F.2d 218 (C.A. 3); *Eisenmenger* v. *Commissioner*, 145 F. 2d 103 (C.A. 8), reversing 44 B.T.A. 489.

To be sure, it may be possible to reconcile some of these cases, but the results are not always satisfying. For ex- [fol. 28] ample, a prior decision may be explained away on the ground that there was collusion, but a close inspection of the particular situation would reveal that

there was no magic in the term "collusion" and that it was used merely as a more severe characterization of a nonadversary proceeding. E.g., *Stallworth's Estate* v. *Commissioner*, 260 F. 2d 760, 763 (C.A. 5); *In re Sweet's Estate*, 234 F. 2d 401, 404 (C.A. 10), affirming 24 T.C. 488, certiorari denied, 352 U.S. 878. On the other hand, the state court decree in some cases in effect merely put a label upon a transaction or characterized a past event or otherwise adjudicated some matter that had no substantial practical consequences to the parties involved apart from Federal tax liability; and in such circumstances it would seem that the decree should be treated as having no binding effect in later tax litigation. Cf. *Newman* v. *Commissioner*, 222 F. 2d 131 (C.A. 9); *Wolfsen* v. *Smyth*, 223 F. 2d 111, 113 (C.A. 9); *M. T. Straight Trust*, 24 T.C. 69, affirmed 245 F. 2d 327 (C.A. 8).

We are not disposed to undertake a comprehensive analysis of all of the cases in this field and to attempt to find a rationalization among them which the appellate courts themselves have been unable satisfactorily to do. We content ourselves here with following the general rule in *Blair* v. *Commissioner*, 300 U.S. 5, and related Supreme Court decisions noted above, p. , and we indicate below some of the considerations that we have taken into account.

1. The New York court herein had jurisdiction over the parties and subject matter of the proceeding, and its [fol. 29] judgment is final and conclusive as to those parties. As a consequence, Mrs. Bosch now has a general power of appointment which she may exercise in favor of herself, her estate, her creditors, or the creditors of her estate.

2. Although the Supreme Court of the State of New York is a trial court, it is "a single great tribunal of general state-wide jurisdiction, rather than an aggregation of separate courts sitting in the several counties or judicial districts of the state". *Schneider* v. *Aulisi*, 307 N.Y. 376, 121 N.E. 2d 375, 377 (1954); see New York State Const., Art. 6, Sec. 7. Its decision not only adjudicates the rights of the parties but represents legal precedent for courts throughout the state. The situation is

thus quite different from that involving local courts with limited geographical jurisdiction whose decisions are not binding upon other courts elsewhere within the state. *Brainard* v. *Commissioner*, 91 F. 2d 880, 884 (C.A. 7), certiorari dismissed, 303 U.S. 665; *Faulkerson's Estate* v. *United States*, 301 F. 2d 231, 232 (C.A. 7), certiorari denied, —— U.S. ——.

3. The Commissioner was fully aware of the proceeding in the New York court, and, had he chosen to do so, could have sought the opportunity to present his views to that court. Indeed, the record before us shows that he agreed to a continuance of the hearing in this court, so that the New York proceeding might first be brought to a conclusion.

4. The New York court rendered a reasoned opinion and reached a "deliberate conclusion", *Blair* v. *Commis-*
[fol. 30] *sioner*, 300 U.S. at p. 10. Although, in our judgment, a more persuasive case could possibly be made out for the opposite result, there do not appear to be any contrary decisions and we cannot with confidence say that the New York court was wrong or that its opinion will not be followed by other New York courts.

5. The decision of the New York court, which is binding upon Mrs. Bosch, may have certain offsetting tax consequences in respect of her own estate tax. The New York decree establishing that she has a general power of appointment will result in the inclusion in her gross estate of any property passing under her exercise of that power. Section 2041, Internal Revenue Code of 1954. And we cannot reasonably assume that she will permit that power to remain unexercised, for there are indications in the record that the immediate natural objects of her bounty do not include all of the many relatives of her husband who would take in default of her exercise of the power. Thus, the state court decree provided more than a label for past events that would affect the present litigation; it authoritatively determined the nature of the power of appointment with potentially adverse tax consequences at a later date.

[fol. 31] We emphasize that we reach our conclusion upon the entire record and upon all of the foregoing considerations, taken in the aggregate. Needless to say, one or more of these factors might not be sufficient to tip the scales. Nor is it necessary to say that we are bound by the New York decision. It is sufficient merely to state that, in the foregoing circumstances, we accept the New York decision as an authoritative exposition of New York law and adjudication of the property rights involved.

Decision will be entered under Rule 50.

[fol. 32]

BEFORE THE TAX COURT OF THE UNITED STATES

* * * *

DECISION—Feb. 2, 1965

Pursuant to the opinion of the Court filed November 3, 1964, and the agreed computation of the tax liabilities filed by the parties; and incorporating herein the facts recited in the computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in estate tax due from the petitioner in the amount of $14,748.91 of which $13,873.92 has been paid.

/s/ ARNOLD RAUM
Judge.

Entered: Feb. 2—1965

* * * *

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the agreed computation of the parties, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein, pursuant to the statute in such cases made and provided.

/s/ JOHN A. CLARK
Counsel for Petitioner.

/s/ MITCHELL ROGOVIN
Chief Counsel
Internal Revenue Service

[fol. 33]

BEFORE THE TAX COURT OF THE UNITED STATES

* * * *

PETITION FOR REVIEW—Filed April 30, 1965

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Second Circuit to review the decision entered by the Tax Court of the United States in the above-entitled case on February 2, 1965, that there is a deficiency in estate tax due from taxpayer in the amount of $14,748.91, of which $13,873.92 has been paid.

The respondent on review is the Estate of Herman J. Bosch, Irving Trust Company, Executor. Herman J. Bosch died on April 6, 1957, a resident of New York. On July 7, 1958, taxpayer's federal estate tax return was filed with the Director of Internal Revenue for the Upper Manhattan District of New York, which district is within the jurisdiction and venue of the United States Court of Appeals for the Second Circuit wherein this review is sought.

This petition is filed pursuant to the provisions of sections 7482 and 7483 of the Internal Revenue Code of 1954.

/s/ LOUIS F. OBERDORFER
LOUIS F. OBERDORFER
Assistant Attorney General

/s/ MITCHELL ROGOVIN
MITCHELL ROGOVIN
Chief Counsel
Internal Revenue Service
Attorneys for Petitioner on Review

OF COUNSEL:

CHARLES OWEN JOHNSON
Attorney
Internal Revenue Service

[fol. 34] EXHIBIT 1A TO STIPULATION

TRUST AGREEMENT, made this 9th day of April 1930, by and between HERMAN J. BOSCH, residing at 85 Cedar Street, Rye, New York, party of the first part (hereinafter referred to as the Grantor), and IRVING TRUST COMPANY, a New York corporation, organized under and pursuant to the banking laws of the State of New York, having an office at Park Avenue and 42nd Street, New York City, party of the second part (hereinafter referred to as the Trustee).

WITNESSETH:

The Grantor, for and in consideration of the agreements hereinafter contained, and of the sum of One Dollar ($1.00) lawful money of the United States to the Grantor in hand paid by the Trustee, at or before the ensealing and delivery of these presents, the receipt whereof by the Grantor is hereby acknowledged, hereby sells, assigns, transfers and sets over to the Trustee the securities and property set forth upon Schedule A annexed to this agreement, and initialed for identification by the parties hereto, which Schedule A is hereby made a part of this agreement, IN TRUST, NEVERTHELESS, for the uses and purposes hereinafter set forth, as follows:

FIRST: To hold, invest and reinvest the same (subject to the provisions hereinafter set forth), and to collect the issues and income thereof and to pay to or apply to the use of MARGARET BOSCH, the wife of the Grantor now residing at 85 Cedar Street, Rye, New York (hereinafter referred to as the Beneficiary), the net income [fol. 35] thereof, in quarterly installments, during her life, and upon the death of the beneficiary, to pay over, transfer and deliver the principal of the trust fund to the Grantor, if living, and if not living, then to the executors or administrators c.t.a. appointed to administer the estate of the Grantor, provided, however, that should the Grantor die intestate in the lifetime of the beneficiary, then upon the death of the beneficiary, to pay over, transfer and deliver the principal of the fund to the then next of kin of the Grantor, as determined by the laws of the State of New York then obtaining, in the same propor-

tions as they would have been entitled to the personal estate of the Grantor if his death had occurred at that time.

SECOND: This agreement, and the trust hereby created, is subject to the terms, conditions and provisions as follows:

The Grantor reserves to himself the right, during his life and the existence of the trust, to direct and control the action of the Trustee in making sales and/or purchases of securities as investments constituting the principal of the trust fund. The Trustee shall, from time to time, reinvest the trust fund and shall, from time to time, sell the investments and reinvestments of the trust fund, at such prices and on such terms as shall be directed in writing by the Grantor. The Trustee shall reinvest the proceeds of any such sale or sales in such stocks (including common stocks), bonds or other securities as shall be directed in writing by the Grantor and, if practicable, at the prices stated in any such direction. The Trustee [fol. 36] may, however, advise the Grantor with respect to investments or reinvestments of the trust fund, and if the Grantor shall fail to give written directions concerning such proposed investments or reinvestments within twenty (20) days after the mailing by the Trustee of a request therefor to the address of the Grantor then on file with the Trustee, then the Trustee may proceed to act in the premises without the direction or consent of the Grantor and may invest and reinvest the trust fund, or any part thereof, in such stock (including common stocks), bonds and/or other securities as it may deem advantageous, and shall not be restricted to those investments legal for trustees under the laws of the State of New York. In the event that at any time, in the judgment of the Trustee, it is advisable to sell any of the securities or investments of the trust fund, and the Trustee shall not notify the Grantor at the address above provided for, and if the Grantor shall fail to give written directions concerning such suggested sale or sales within twenty (20) days after the mailing by the Trustee of said notification, then the Trustee may proceed to make such sale or sales as, in its unrestricted discretion, it may deem proper, and it shall be under no

liability for so doing. After the death of the Grantor sales and investments shall be made at the discretion of the Trustee, and the Trustee shall not be restricted to investments legal for Trustees under the laws of the State of New York. The Trustee is hereby expressly relieved from all liability and responsibility with respect to any sales, investment or reinvestment made by it in accord-
[fol. 37] ance with the terms hereof. Subject to the control reserved to the Grantor during his life the Trustee may retain any property which may herewith or hereafter be delivered to it to be held by it pursuant to the provisions of this agreement, and it is hereby expressly relieved from all liability and responsibility with respect to any such property received by it from the Grantor or any other person and from all liability and responsibility with respect to any sale, investment and/or reinvestment of such property made by it. The Trustee is authorized and empowered to cause any and all securities and property included in the trust fund to be registered in or transferred to its name as Trustee or to the name or names of its nominees, and to consent to, and take part in, the corporate action, consolidation, merger, adjustment, readjustment or reorganization which may affect any of the property included in the trust fund, or to take any other corporate action with respect to any of such securities, and in any such event, to pay over or charge to the principal of the trust fund any assessments which may at any time be levied or imposed in respect thereof.

All stock dividends shall be treated as principal and all rights of subscription to stock and/or to bonds, and the proceeds of all such rights, shall be treated as principal. All cash dividends shall be treated as income. The Trustee shall not be required to amortize any premiums paid, before or after the creation of this trust, in the purchase of securities or other investments for the trust fund.

[fol. 38] In case any property shall be added to this trust, pursuant to the provisions hereof, the property so added shall be subject to all the terms and provisions of

this agreement to the same effect as if such property were originally deposited hereunder.

The Grantor hereby reserves the right, and has the right, to amend, change, alter or modify this agreement, in whole or in part, with the consent of the Trustee, upon giving to the Trustee ten (10) days' notice in writing of his intention so to amend, change, alter or modify this agreement; and upon filing with the Trustee an instrument, in writing, approved by it, amending, changing, altering or modifying this instrument this agreement shall be deemed amended, changed, altered or modified, in accordance with the terms and provisions of such instrument or instruments.

The Grantor also reserves the right, and has the right, to revoke this trust in whole upon giving the Trustee ten (10) days written notice of his intention so to revoke; and the Grantor reserves, and has, the further right, at any time and from time to time, during his life, to withdraw any part of the corpus of the trust fund upon giving the Trustee ten (10) days written notice of his intention so to withdraw. Upon any such withdrawal or upon withdrawal on revocation of the trust, the Trustee shall be entitled to commissions at the rates in this agreement specified as if the trust had terminated pursuant to the terms of this agreement, such commissions to be computed upon the value of the property so withdrawn. Upon any [fol. 39] withdrawal the Trustee will assist the retransfer to, or upon the order of, the Grantor of any securities or property, standing in the name of the Trustee or its nominees, which shall be so withdrawn.

The Trustee hereunder, and any successor acting as Trustee hereunder, shall be entitled to deduct from income, and retain as commissions on income, commissions at the statutory rate allowed by the laws of the State of New York to testamentary trustees, and at the time of receiving the securities and property set forth on said Schedule A to receive one-half of commissions on principal at the rates allowed to testamentary trustees. The balance of commissions on principal shall be paid upon the termination or revocation of the trust, subject, however, to the foregoing provisions with respect to the pay-

ment of commissions on part or parts of the trust fund withdrawn prior to the termination of the trust as a whole.

THIRD: The Trustee hereby acknowledges receipt from the Grantor of the securities specified in the aforesaid Schedule A, and agrees to act as Trustee under this agreement, but the Trustee shall be under no obligation or duty to defend or engage in any suit or legal proceeding in respect of such trust fund, unless first indemnified to its satisfaction. It is agreed that all the powers herein given to the Trustee hereinabove named, shall be exercised by any successor Trustee appointed hereunder.

[fol. 40] IN WITNESS WHEREOF, the party of the first part, the Grantor aforesaid, has set his hand and seal, and initialled Schedule A, and the party of the second part, the Trustee aforesaid, has caused its corporate name to be hereunto subscribed, and Schedule A to be likewise initialled, by an Assistant Vice-President, and its corporate seal to be hereunto affixed and attested this 9th day of April, One thousand nine hundred and thirty.

/s/ HERMAN J. BOSCH (L.S.)
Grantor

IRVING TRUST COMPANY,

By H. M. ATKINS
Assistant Vice-President.
Trustee.

Attest:

EDWARD L. BISHOP
Assistant Secretary

[fol. 41]

STATE OF NEW YORK,)
) ss.
COUNTY OF NEW YORK.)

On this 9th day of April, 1930, before me personally came HERMAN J. BOSCH, to me personally known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he duly executed the same for the purpose therein mentioned.

JOHN W. MOFFETT
Notary Public, Kings County
Clerk's No. 677, Register's No. 1252
New York Co. No. 551, Register's No. 1M379
My Commission Expires March 30, 1931

STATE OF NEW YORK,)
) ss.
COUNTY OF NEW YORK.)

On the 9th day of April, 1930, before me personally came H. M. Atkins to me known, who, being by me duly sworn, did depose and say that he resides in Kings County, N. Y. that he is an Assistant Vice-President of IRVING TRUST COMPANY, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

JOHN W. MOFFETT
Notary Public, Kings County
Clerk's No. 677, Register's No. 1252
New York Co. No. 551, Register's No. 1M379
My Commission Expires March 30, 1931

[fol. 42] EXHIBIT 2B TO STIPULATION

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS, I HERMAN J. BOSCH, residing in Rye, New York, did execute on the 9th day of April, 1930, an agreement of trust dated said day, in which Irving Trust Company is named as Trustee and I, the grantor named in said instrument, having reserved therein the right

> "to amend, change, alter or modify this agreement, in whole or in part, with the consent of the Trustee, upon giving to the Trustee ten (10) days' notice in writing of his intention so to amend, change, alter or modify this agreement; and upon filing with the Trustee an instrument, in writing, approved by it, amending, changing, altering or modifying this instrument, this agreement shall be deemed amended, changed, altered or modified, in accordance with the terms and provisisons of such instrument or instruments."

NOW, THEREFORE, in exercise of the right so reserved by me, I do hereby amend and change said agreement as follows:

FIRST: I hereby amend and change Article FIRST of said agreement and I direct that in the event that I, the Grantor named in said agreement, shall not survive MARGARET BOSCH, the beneficiary named therein, then upon the death of said Margaret Bosch the Trustee shall pay, transfer and deliver the principal of the trust fund to the persons and/or corporations appointed to receive the same by the Last Will and Testament of said Margaret Bosch, and in default of a valid appointment in whole or in part shall divide the trust fund into two parts as nearly equal as may be and shall pay, transfer and deliver one of said parts to and among the persons entitled to the personal estate of said Margaret Bosch under [fol. 43] the intestate laws of New York, and the other of said parts to and among the persons then living who would have been entitled to receive my personal estate under the intestate laws of the State of New York if my death had occurred at that time.

SECOND: Except as herein modified, I do hereby ratify and confirm all the provisions of said agreement of trust dated April 9, 1930.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 6th day of February, 1931.

/s/ HERMAN J. BOSCH (L.S.)

STATE OF NEW YORK,)
) ss.
COUNTY OF NEW YORK.)

On this 6 day of February, 1931, before me personally came HERMAN J. BOSCH, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he acknowledged to me that he duly executed the same for the purposes therein mentioned.

/s/ JOHN W. MOFFETT
JOHN W. MOFFETT
Notary Public, Kings County
Clerk's No. 677, Register's No. 1252
New York Co. No. 551, Register's No. 1M379
My Commission Expires March 30, 1931

IRVING TRUST COMPANY, as Trustee under an Agreement of Trust dated April 9, 1930, between Herman J. Bosch as Grantor and Irving Trust Company, as Trustee, does hereby acknowledge receipt of the due notice [fol. 44] contained in the foregoing instrument executed

by said Grantor amending said trust agreement and the trust thereby created.

Dated,
February 6th, 1931.

IRVING TRUST COMPANY

By

/s/ H. M. ATKINS
Assistant Vice-President.

Attest:

/s/ G. J. DENIKE.
Assistant Secretary.

STATE OF NEW YORK,)
) ss.
COUNTY OF NEW YORK.)

On the 6th day of February, 1931, before me personally came HENRY M. ATKINS, to me known, who, being by me duly sworn, did depose and say, that he resides in the Borough of Brooklyn, City of New York, County and State of New York; that he is an Assistant Vice-President of IRVING TRUST COMPANY, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

/s/ JOHN W. MOFFETT
JOHN W. MOFFETT
Notary Public, Kings County
Clerk's No. 677, Register's No. 1252
New York Co. No. 551, Register's No. 1M379
My Commission Expires March 30, 1931

[fol. 45] EXHIBIT 3C TO STIPULATION

Mrs. Margaret Bosch
Hotel Commodore
Lexington Avenue & 42nd Street
New York 17, New York

Margaret Bosch Trust

Dear Mrs. Bosch:

Trust agreement dated April 9, 1930 made by Herman J. Bosch for your benefit, as amended by instrument dated February 6, 1931, provides that if Herman J. Bosch does not survive you, then

> "upon the death of said Margaret Bosch the trustee shall pay, transfer and deliver the principal of the trust fund to the persons and/or corporations appointed to receive the same by the Last Will and Testament of said Margaret Bosch".

This is what is known as a general power of appointment concerning which important legislation has recently been enacted by Congress, especially as to the tax aspect.

The matter is somewhat complicated, but we feel we should call to your attention that *October 31, 1951* is the deadline on or before which certain action must be taken, if deemed desirable, to overcome the tax consequences.

It is quite possible you have had this matter under consideration with your attorney and have decided to take no action with respect to your power of appointment. If you have not done so we respectfully suggest you consult him promptly.

Very truly yours

IRVING TRUST COMPANY
MARION QUELL

MQ:DD

[fol. 46] EXHIBIT 4D TO STIPULATION

MARGARET BOSCH TRUST U/A—$55,000

Herman J. Bosch, Grantor—"67" 42nd Street Branch Office A/C Hotel Commodore

October 19, 1951

Mr. Herman J. Bosch, grantor of the Margaret Bosch Trust, called at the bank today in connection with our letter regarding the general power of appointment which his wife, Margaret Bosch, has over the principal of the trust fund (see amendment dated February 6, 1931), and the taxability of it in Mrs. Bosch's estate. I told Mr. Bosch we had no idea of the size of his wife's estate, but if there is a possibility of its being over the $60,000 federal exemption, some action should be taken to reduce the power. He mentioned that he had considered making the trust irrevocable, but that a gift tax would then be involved; he wondered also if the gift coul[illegible]e extended over a period of years so that it would be exempt.

During the conversation I gathered that Mr. Bosch has a brother, age seventy-one, who is engeged with him in his business; Mrs. Bosch has a widowed sister who has two children for whom Mr. Bosch has undertaken to provide a home since the death of the father. Mr. Bosch thought his wife might wish to leave the corpus of this trust to that sister.

I spoke to Mr. Bosch again about his will drawn in 1931 and recommended that he see his attorney to consider whether it should be redrawn in view of the new tax laws which heve been passed in recent years; I suggested that perhaps under the marital deduction provisions he might wish to consider leaving one half of his estate outright to his wife and the other half in trust for her life with payment of the principtal upon her death. He said he would like to consider having his will redrawn, and it was arranged that he would see Dermod Ives, Esq. of Davies, Hardy, Schenck & Soons (in the absence of Mr. Soons who is ill) on Monday, October twenty-second at 2 o'clock.

Mr. Bosch who is about seventy-five years of age is believed to be worth about $750,000. He, at one time, owned the hairdressing establishments in the Hotel Biltmore and the Hotel Commodore. He sold the one in the Biltmore about ten years ago and is anxious to retire from business now, as he finds it quite a strain to get about; he stated also that his wife, who had been associated with him in the business, has been quite ill for the past two years, and that she had been able to find little if any relief.

M. Q.

[fol. 47] EXHIBIT 5E TO STIPULATION

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS I, MARGARET BOSCH, am the life beneficiary of the trust created by a certain Agreement of Trust dated April 9, 1930 between Herman J. Bosch, as Grantor, and Irving Trust Company, as Trustee, which trust is now being administered by said Irving Trust Company as such Trustee; and

WHEREAS, by an amendment of said Agreement of Trust, dated February 6, 1931, made by said Grantor pursuant to the power thereby preserved to him, it is provided that in the event that said Grantor shall not survive me, the beneficiary therein named—

> "then upon the death of said Margaret Bosch the Trustee shall pay, transfer and deliver the principal of the trust fund to the persons and/or corporations appointed to receive the same by the Last Will and Testament of said Margaret Bosch, * * *"

and

WHEREAS I desire to release in part my contingent power of appointment under said Agreement of Trust in the manner contemplated by the "Powers of Appointment Act of 1951" amending Section 811(f) and Section 1000 (c) of the Internal Revenue Code of the United States of America, so that my said contingent power of appointment under said Agreement of Trust shall not be a general power of appointment,

NOW, THEREFORE, I, said Margaret Bosch, hereby renounce, relinquish, surrender and release my said con- [fol. 48] tingent power to appoint all or any part of said trust fund created by said Agreement of Trust dated April 9, 1930 made by Herman J. Bosch, as amended by instrument dated February 6, 1931, or any property which may hereafter form a part of said trust fund, in favor of myself, my estate, my creditors or the creditors of my estate.

Any attempted exercise of said power made by my Will which is inconsistent or in any way in conflict with this release and limitation by me of said power shall be void.

IN WITNESS WHEREOF, I have executed this instrument in duplicate this 25 day of October, 1951.

/s/ MARGARET BOSCH (L.S.)
MARGARET BOSCH

STATE OF NEW YORK)
) SS:
COUNTY OF WESTCHESTER)

On this 25 day of October, 1951, before me personally came MARGARET BOSCH, to me known and known to me to be the individual described in and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same.

/s/ MARY E. HOEY
Notary Public
MARY E. HOEY
Notary P. St. of N.Y.
No. 60-181500
Qualified in Westchester Co.
Term expires March 30, 1953

[fol. 49] EXHIBIT 6F TO STIPULATION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

In the Matter of the Judicial Settlement of the Intermediate Account of Proceedings of IRVING TRUST COMPANY as Trustee under a certain Agreement of Trust, dated April 9, 1930, as amended, made by HERMAN J. BOSCH.

PETITION

Index No. 1216/1963

TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU

The petition of IRVING TRUST COMPANY, as Trustee under a certain Agreement of Trust, dated April 9, 1930, made by Herman J. Bosch, as amended, respectfully shows on information and belief that:

* * * *

6. Pursuant to said reservation of the right to amend, change, alter or modify said Agreement of Trust, said grantor by instrument dated February 6, 1931, amended and changed said Agreement of Trust as follows:

"FIRST: I hereby amend and change ARTICLE FIRST of said agreement and I direct that in the event that I, the Grantor named in said agreement, shall not survive MARGARET BOSCH, the beneficiary named therein, then upon the death of said Margaret Bosch, the Trustee shall pay, transfer and deliver the principal of the trust fund to the persons and/or corporations appointed to receive the same by the Last Will and Testament of said Margaret Bosch, and in default of a valid appointment in whole or in part shall divide the trust fund into two parts as nearly equal as may be and shall pay, transfer and deliver one of said parts to and among the persons entitled to the personal estate of said Margaret Bosch under the intestate laws of New York, and the other of said parts to and among the persons then living

who would have been entitled to receive my personal estate under the intestate laws of the State of New York if my death had occurred at that time."

[fol. 50] 7. By instrument dated October 25, 1951, Grantor's said wife, Margaret Bosch, partially released the power of appointment granted by said amendment dated February 6, 1931, as follows:

"WHEREAS I desire to release in part my contingent power of appointment under said Agreement of Trust in the manner contemplated by the 'Powers of Appointment Act of 1951' amending Section 811 (f) and Section 1000(c) of the Internal Revenue Code of the United States of America, so that my said contingent power of appointment under said Agreement of Trust shall not be a general power of appointment,

"NOW, THEREFORE, I, said Margaret Bosch, hereby renounce, relinquish, surrender and release my said contingent power to appoint all or any part of said trust fund created by said Agreement of Trust dated April 9, 1930 made by Herman J. Bosch, as amended by instrument dated February 6, 1931, or any property which may hereafter form a part of said trust fund, in favor of myself, my estate, my creditors or the creditors of my estate.

"Any attempted exercise of said power made by my Will which is inconsistent or in any way in conflict with this release and limitation by me of said power shall be void."

• • • •

9. Said grantor died a resident of 85 Cedar Street, Rye, New York, on April 6, 1957, leaving a Last Will and Testament which was duly admitted to probate by the Surrogate's Court of the County of Westchester on October 4, 1957, and on that date letters testamentary issued to Irving Trust Company, the Executor named in said decedent's will, which duly qualified and acted and continues to act as such Executor. Said grantor's gross [fol. 51] estate for tax, included the said trust for his

wife, Margaret Bosch, created by said Agreement of Trust dated April 9, 1930, as amended.

* * * *

The Executor of the grantor's will, on the advice of counsel, filed United States and New York estate tax returns in which it claimed a "marital deduction" for such April 9, 1930 trust, as amended. Upon the audit of the United States Estate Tax return, the District Director of Internal Revenue refused to allow a marital deduction for such trust and issued a notice of deficiency of estate tax on that ground.

There is pending in the Tax Court of The United States an action brought by the Executor to determine whether or not such April 9, 1930 trust, as amended, qualifies for the marital deduction. * * *

* * * *

In the Tax Court, the Executor contends that the April 9, 1930 trust, as amended, qualifies for the marital deduction on the ground that the instrument dated October 25, 1951, executed by Margaret Bosch, partially releasing the general power of appointment, was invalid and of no force and effect.

* * * *

WHEREFORE,

1. Your petitioner, Irving Trust Company, prays * * *

[fol. 52] 2. This Court determine at this time the validity of the instrument executed by Margaret Bosch on October 25, 1951, purportedly partially releasing her "contingent power of appointment" * * *

* * * *

IRVING TRUST COMPANY

By /s/ J. W. MOFFETT
Assistant Vice President
As Trustee
Petitioner.

DAVIES, HARDY & SCHENCK
Attorneys for Petitioner
Office and P.O. Address:
2 Broadway
New York 4, N.Y.

[fol. 53]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

In the Matter of the Judicial Settlement of the Intermediate Account of Proceedings of IRVING TRUST COMPANY as Trustee under a certain Agreement of Trust, dated April 9, 1930, as amended, made by HERMAN J. BOSCH.

ORDER TO SHOW CAUSE

Index No. 1216/1963

On reading the verified petition of Irving Trust Company, as Trustee under a certain Agreement of Trust dated April 9, 1930, made by Herman J. Bosch, as amended, and the verified account of proceedings of said Trustee;

* * * *

ORDERED, that the following persons, * * * show cause * * * why a final order * * * should not be made in the above-entitled proceeding, * * * determining at this time the validity of the instrument executed by Margaret Bosch dated October 25, 1951, purportedly partially releasing her "contingent power of appointment" * * *.

* * * *

[fol. 54] EXHIBIT 10J TO STIPULATION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK—SPECIAL TERM PART I

In the Matter of the Judicial Settlement of the Intermediate Account of Proceedings of IRVING TRUST COMPANY as Trustee under a certain Agreement of Trust, dated April 9, 1930, as amended, made by HERMAN J. BOSCH

Index No. 1216/1963

DAVIDSON, J.

In this proceeding to judically settle and allow the intermediate account of the Trustee under an inter vivos trust, a ruling is requested respecting the validity of an instrument executed by Margaret Bosch, wife of the Settlor of the Trust, dated October 25, 1951 purportedly partially releasing her contingent power of appointment.

On April 9, 1930 Herman J. Bosch created a trust which provided for the payment of income to his wife for her life with a reversion to the Grantor if his wife should predecease him, or to his estate if he should predecease his wife, leaving a will, or to his next of kin if he should die intestate.

The trust instrument reserved to the Grantor the right to alter or amend the trust at any time during his life with the consent of the Trustee, and the further right without the consent of the Trustee or any other person to revoke the Trust in whole or in part.

On February 6, 1931 the Grantor exercised his right to amend the trust to provide that his wife, Margaret [fol. 55] Bosch, should have a general power of appointment over the property of the trust *exercisable by Will* if she survived the Grantor. The power in the Grantor to further alter, amend or revoke the trust in his lifetime was undisturbed by this amendment.

On October 25, 1951, during the lifetime of the Grantor, his wife, Margaret Bosch, executed an instrument by

which she purported to effect a partial release of the general power of appointment granted to her by the trust instrument as amended. The Grantor, Herman Bosch, died on April 6, 1957.

The applicable provision of the law is Section 183, Subdivision 1 of the Real Property Law, which states:

> "Any power which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power in trust which is imperative, is releasable, either with or without consideration, by written instrument signed by the grantee and delivered as hereinafter provided."

This section, although a part of the Real Property Law, applies to powers of appointment over personal property as well as to powers over real property. MATTER OF NEW YORK TITLE AND MORTGAGE COMPANY 150 Misc. 488; IN RE GOLDOWITZ WILL 145 Misc. 300; MATTER OF COOKSEY'S ESTATE 182 N.Y. 92.

In order that the donee of a power of appointment release any rights under that power, the donee must have the right to exercise the power at the time the purported release is made. It seems clear that the donee of power of appointment cannot exercise it prior to its creation. MATTER OF PIFFARD 111 N.Y. 410.

[fol. 56] In the instant case, Margaret Bosch, on October 25, 1951, sought to effect a partial release of the power of appointment over the property of the trust. At that time she lacked the power to exercise any rights under the trust instrument. Her power with respect to the trust instrument came into being upon the death of the Grantor on April 6, 1957. A power of appointment created under a revocable deed of trust, which power shall be exercised by will, may not be exercised while the Settlor of the trust is still alive. Since she could not have exercised the power of appointment on October 25, 1951 she could not have effected a valid partial release of the power on that date. Hence her purported partial release of the power of appointment on October 25, 1951 was a nullity. MATTER OF PIFFARD, supra.

Accordingly, the purported partial release by Margaret Bosch on October 25, 1951 of the power of appointment granted to her by the trust instrument was a nullity. Settle order.

/s/ IRVIN D. DAVIDSON
J.S.C.

Dated: November 8, 1963

[fol. 57]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 306—September Term, 1965

(Argued May 25, 1966)

Docket No. 29883

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN J. BOSCH, Deceased,
IRVING TRUST COMPANY, Executor, RESPONDENT

Before: FRIENDLY, HAYS and FEINBERG, *Circuit Judges*

OPINION—July 6, 1966

Petition for review of a decision of the Tax Court, Raum, *Judge* (43 T. C. 120 (1964)), holding that the interest of decedent's surviving spouse in an *inter vivos* trust created by decedent qualifies for the marital deduction under the terms of Section 2056(b)(5) of the Internal Revenue Code of 1954, 26 U. S. C. § 2056(b)(5).

Affirmed.

[fol. 58]

BENJAMIN M. PARKER, Attorney for the Department of Justice, Washington, D. C. (Richard M. Roberts, Acting Assistant Attorney General, Lee A. Jackson and Robert N. Anderson, Attorneys, on the brief), *for Petitioner.*

JOHN W. BURKE, New York, N. Y. (John A. Clark, Dermond Ives and Davies, Hardy & Schenck, New York, N. Y., of counsel), *for Respondent.*

HAYS, *Circuit Judge*:

The Commissioner petitions for review of a decision of the Tax Court which held that the Commissioner had erroneously disallowed the sum of $70,222.04 as a marital deduction under Section 2056(b)(5) of the Internal Revenue Code of 1954, 26 U. S. C. § 2056(b)(5).[1] We affirm the Tax Court.

[fol. 59] The facts are fairly simple and are not in dispute.

On April 9, 1930 the decedent set up a trust by the terms of which the income was to be paid to his wife during her lifetime. Upon the death of the wife the corpus was to be paid to the grantor or his estate. The trust was amendable and revocable.

On February 6, 1931 decedent amended the trust instrument to grant to his wife a general power of appointment. She was empowered to appoint by her will the corpus of the trust to any "persons and/or corporations." The amendment provided for a disposition over in the event the wife failed to exercise her power of appointment.

On October 25, 1951, the wife executed a document by which she purported to release a portion of her general

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[1] "(5) *Life estate with power of appointment in surviving spouse.*—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, * * * with power in the surviving spouse to appoint the entire interest, * * * (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest * * * thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(b) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events."

power of appointment under the trust and to convert it into a special power of appointment.[2]

[fol. 60]* It appears from the document itself and it is readily conceded by the trustee, which proposed to Mr. and Mrs. Bosch the execution of the release, that the purpose of the release was to take advantage of the Powers of Appointment Act of 1951, Ch. 165, 65 Stat. 91, amend-

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[2] "KNOW ALL MEN BY THESE PRESENTS:

WHEREAS I, MARGARET BOSCH, am the life beneficiary of the trust created by a certain Agreement of Trust dated April 9, 1930 between Herman J. Bosch, as Grantor, and Irving Trust Company, as Trustee, which trust is now being administered by said Irving Trust Company as such Trustee; and

WHEREAS, by an amendment of said Agreement of Trust, dated February 6, 1931, made by said Grantor pursuant to the power thereby preserved to him, it is provided that in the event that said Grantor shall not survive me, the beneficiary therein named—

> 'then upon the death of said Margaret Bosch the Trustee shall pay, transfer and deliver the principal of the trust fund to the persons and/or corporations appointed to receive the same by the Last Will and Testament of Said Margaret Bosch, * * *'

and

WHEREAS I desire to release in part my contingent power of appointment under said Agreement of Trust in the manner contemplated by the 'Powers of Appointment Act of 1951' amending Section 811(f) and Section 1000(c) of the Internal Revenue Code of the United States of America, so that my said contingent power of appointment under said Agreement of Trust shall not be a general power of appointment,

NOW, THEREFORE, I, said Margaret Bosch, hereby renounce, relinquish, surrender and release my said contingent power to appoint all or any part of said trust fund by said Agreement of Trust dated April 9, 1930 made by Herman J. Bosch, as amended by instrument dated February 6, 1931, or any property which may hereafter form a part of said trust fund, in favor of myself, my estate, my creditors or the creditors of my estate.

Any attempted exercise of said power made by my Will which is inconsistent or in any way in conflict with this release and limitation by me of said power shall be void.

IN WITNESS WHEREOF, I have executed this instrument in duplicate this 25 day of October, 1951.

/s/ Margaret Bosch (L.S.)
MARGARET BOSCH"

ing Int. Rev. Code of 1939, § 811(f) (now Int. Rev. Code of 1954, § 2041), then recently enacted, and thus "to prevent the assets of the trust being taxed as part of Margaret Bosch's estate."

On April 6, 1957 Herman Bosch died. His executor claimed a marital deduction for the value of the trust. The Commissioner determined that the trust did not qualify for the marital deduction and asserted a federal tax deficiency based upon the disallowance in the amount of $70,222.04, the value of the corpus of the trust.

The executor filed a petition in the Tax Court for a redetermination of the deficiency. While the action was pending in the Tax Court, the trustee, which was also executor of the estate of Herman Bosch, brought a proceeding in the New York Supreme Court for a settlement of its account as trustee. In connection with the proceeding in the New York Supreme Court, the trustee asked for a determination of the validity of Mrs. Bosch's release of part of her power of appointment. Respondent stipulated and conceded that the New York proceeding was instituted "at least in part for the purpose of [fol. 61] affecting [the] outcome" of the case before the Tax Court. The trustee's petition in the New York court described the proceedings then pending in the Tax Court, and stated the position taken in that proceeding by the executor.

The issue in the state proceeding was whether the release executed by Mrs. Bosch on October 25, 1951 was effective. Three briefs were filed in the New York proceeding, one for Mrs. Bosch, one for the trustee, and one by a guardian *ad litem* in behalf of a minor interested in the trust by reason of being a possible beneficiary in the event Mrs. Bosch died without exercising her power of appointment. All three briefs argued that the release was a nullity. No argument for the validity of the release was presented to the court.

There were twenty-two persons having the same interest as the infant who was represented by the guardian *ad litem*. Although they received notice of the proceeding, none of them appeared.

The state court held that Mrs. Bosch's purported release was a nullity.[3]

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[3] "Matter of Irving Trust Co. (Bosch)—In this proceeding to judicially settle and allow the intermediate account of the trustee under an inter vivos trust, a ruling is requested respecting the validity of an instrument executed by Margaret Bosch, wife of the settlor of the trust, dated October 25, 1951, purportedly partially releasing her contingent power of appointment. On April 9, 1930, Herman J. Bosch created a trust which provided for the payment of income to his wife for her life with a reversion to the grantor if his wife should predecease him, or to his estate if he should predecease his wife, leaving a will, or to his next of kin if he should die intestate. The trust instrument reserved to the grantor the right to alter or amend the trust at any time during his life with the consent of the trustee, and the further right without the consent of the trustee or any other person to revoke the trust in whole or in part. On February 6, 1931, the grantor exercised his right to amend the trust to provide that his wife, Margaret Bosch, should have a general power of appointment over the property of the trust *exercisable by Will* if she survived the grantor. The power in the grantor to further alter, amend or revoke the trust in his lifetime was undisturbed by this amendment. On October 25, 1951, during the lifetime of the grantor, his wife, Margaret Bosch, executed an instrument by which she purported to effect a partial release of the general power of appointment granted to her by the trust instrument as amended. The grantor, Herman Bosch, died on April 6, 1957. The applicable provision of the law is section 183, subdivision 1, of the Real Property Law, which stated: 'Any power which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power in trust which is imperative, is releasable, either with or without consideration, by written instrument signed by the grantee and delivered as hereinafter provided.' This section, although a part of the Real Property Law, applies to powers of appointment over personal property as well as to powers over real property (Matter of N. Y. Title & Mortgage Co., 150 Misc. 488; In re Goldwitz Will, 145 Misc. 300; Matter of Cooksey's Estate, 182 N. Y. 92). In order that the donee of a power of appointment release any rights under that power, the donee must have the right to exercise the power at the time the purported release is made. It seems clear that the donee of power of appointment cannot exercise it prior to its creation (Matter of Piffard, 111 N. Y. 410). In the instant case, Margaret Bosch, on October 25, 1951, sought to effect a partial release of the power of appointment over the property of the trust. At that time she lacked the power to exercise any rights under the trust instrument. Her power with respect to the trust instrument came into being upon the death of the grantor on April 6, 1957. A power of appointment created under a revocable deed of trust, which

[fol. 62] The Tax Court decided to accept the New York decision and gave the following reasons for doing so:

1. The New York court had jurisdiction over the parties and subject matter of the proceeding, and its judgment was final and conclusive as to those parties. Therefore, Mrs. Bosch now has a general power of appointment which she could exercise in [fol. 63] favor of herself, her estate, her creditors, or the creditors of her estate.

2. Decisions of the Supreme Court of the State of New York represent legal precedent for courts throughout the state, unlike decisions of local courts with limited geographical jurisdiction whose decisions are not binding upon other courts of the state.

3. The Commissioner was fully aware of the proceeding in the New York court and could have sought the opportunity to present his views to that court. Indeed, he agreed to the continuance of the hearing before the Tax Court so that the New York proceeding might be brought to a conclusion.

4. The New York court rendered a reasoned opinion and reached a deliberate conclusion.

5. The New York court's decision, which is binding upon Mrs. Bosch, may have certain offsetting tax consequences in respect to her own estate tax. The New York decree establishing that she has a general power of appointment will result in the inclusion in her gross estate of any property passing under her exercise of that power, and the record indicates that it is not reasonable to assume that

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power shall be exercised by will, may not be exercised while the settlor of the trust is still alive. Since she could not have exercised the power of appointment on October 25, 1951, she could not have effected a valid partial release of the power on that date. Hence her purported partial release of the power of appointment on October 25, 1951, was a nullity (Matter of Piffard, supra). Accordingly, the purported partial release by Margaret Bosch on October 25, 1951, of the power of appointment granted to her by the trust instrument was a nullity. Settle order." N. Y. L. J., November 15, 1963.

this power of appointment will remain unexercised.* Thus, the state court decree was more than "a label for past events that would affect the present litigation; it authoritatively determined the nature of the power of appointment with potentially adverse tax consequences at a later date."

[fol. 64] The Tax Court stated that it was not necessary for it to say that it was "bound" by the New York decision. It held that it was sufficient to state, for all of the above reasons, that it would accept the New York decision "as an authoritative exposition of New York law and adjudication of the property rights involved."

In deciding whether the Tax Court ascribed proper effect to the state decision, a few preliminary observations may be helpful. We believe that much of the confusion in the cases is caused by the failure of the courts carefully to formulate the issue. For example, it is quite clear that the state decision is not binding upon the federal courts because the situation is covered by the principle of *res judicata*. See *Freuler* v. *Helvering*, 291 U. S. 35, 43 (1934). Obviously the Commissioner is not bound by the state decision in a *res judicata* sense, since he was not a party to the litigation which resulted in the decision. It may be that it would be desirable to hold the Commissioner bound when he has received notice and an opportunity to appear as in this case, but that is clearly not the law now, and any such change in the law would no doubt require legislative action. Similarly the federal courts are not bound in this situation by the rule of *Erie R.R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). It is for this reason that most of the Commissioner's argument must be considered to be beside the point. The task here is not to discover the general New York law applicable to releases of powers of appointment. That may well be the subject of the required search in a case which concerns a taxpayer whose own special status

* The Tax Court said "[W]e cannot reasonably assume that she will permit that power to remain unexercised, for there are indications in the record that the immediate natural objects of her bounty do not include all of the many relatives of her husband who would take in default of her exercise of the power."

under New York law has never been authoritatively determined by a New York tribunal. In the determination of the present case we are not required to take issue with our learned colleague, Judge Friendly, whose brilliant [fol. 65] lecture *In Praise of Erie—And of the New Federal Common Law*, 39 N. Y. U. L. Rev. 383 (1964) is quoted in the Commissioner's Reply Brief. We may indeed agree with him that the correct view, that "the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law," is set forth by Judge Waterman in *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.*, 234 F. 2d 538, 541 n. 1 (2d Cir. 1956). The reference in the quoted passage is to the great run of cases in which the federal courts are obliged to search out the general principle of state law in order to apply that principle to a case under consideration. It does not refer, and was never intended to refer, to the question of whether or not a federal court is to accept a state determination of the rights under state law of a party to a federal action. In the latter situation, which is that in the case at bar, the party comes into the federal court with his rights already fixed by a decision of a state tribunal. There is no occasion to inquire into the general law of the state to ascertain what those rights are.

The issue is, then, strictly speaking, not whether the federal court is "bound by" the decision of the state tribunal, but whether or not a state tribunal has authoritatively determined the rights under state law of a party to the federal action.

This is clearly the effect of *Sharp* v. *Commissioner*, 303 U. S. 624 (1938), reversing, 91 F. 2d 802 (3d Cir. 1937), *Blair* v. *Commissioner*, 300 U. S. 5 (1937) and *Freuler* v. *Helvering*, 291 U. S. 35 (1934). In the *Blair* case, the issue was whether a certain trust was a spendthrift trust under the law of Illinois. The Circuit Court of Appeals, examining the general law of Illinois on the subject, held it to be a spendthrift trust. The trustees thereupon brought an action in the Illinois courts to obtain a con- [fol. 66] struction of the will and the Appellate Court of Illinois, an intermediate appellate court, held that the trust was not a spendthrift trust. The United States

Supreme Court ruled that the Commissioner was required to accept the Illinois decision as dispositive. The Court said:

> "In this instance, it is not necessary to go beyond the obvious point that the decision was in a suit between the trustees and the beneficiary and his assignees, and the decree which was entered in pursuance of the decision determined as between these parties the validity of the particular assignments." 300 U. S. at 10.

In deciding whether the determination of the rights under state law of a party to a federal action has been authoritative, the majority of federal courts in which the question has been raised have refused to accept the result in cases which were non-adversary.[4] However, there is very respectable authority for the proposition that, if the state decision is bending on the parties as to their rights under state law (as it would not be if it resulted from fraud or collusion), it is conclusive as to those rights for purposes of federal taxation. In *Gal-*
[fol. 67] *lagher* v. *Smith*, 223 F. 2d 218, 223 (3d Cir. 1955), the court said:

> "An adjudication of such a question of title by a court of the state must accordingly be given effect, not because it is res judicata against the United

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[4] See the discussion and the cases cited in the following:

10 Mertens, *Law of Federal Income Taxation*, Ch. 61 (Zimet Revision 1964); Braverman and Gerson, *The Conclusiveness of State Court Decrees in Federal Tax Litigation*, 17 Tax L. Rev. 545 (1962); Colowick, *The Binding Effect of a State Court's Decision in a Subsequent Federal Income Tax Case*, 12 Tax L. Rev. 213 (1957); Holzman, *Impact of State Law upon Fed. Tax.*, 42 Taxes 240 (1964); Sacks, *Binding Effect of Nontax Litigation in State Courts*, N. Y. U. 21st Inst. on Fed. Tax., 277 (1963); Stephens & Freeland, *The Role of Local Law and Local Adjudication in Federal Tax Controversies*, 46 Minn. L. Rev. 223 (1961); Note, *Binding Effect of a Nonadversary State Court Decree in a Federal Tax Determination*, 33 Fordham L. Rev. 705 (1965); Note, *Effect of State Court Decrees in Federal Tax Litigation*, 30 U. of Chi. L. Rev. 569 (1963); Note, *The Role of State Law in Federal Tax Determination*, 72 Harv. L. Rev. 1350 (1959).

States, but because it is conclusive of the parties' property rights which alone are to be taxed. So far as those parties are concerned the law of the state is what the state court has declared and applied in their case. If the state court's judgment has binding final effect under the state law the rights of the parties can only be what the court has held them to be. It is for this reason that the federal court should not in a case of this kind make an independent examination and application of state law. For if it reaches a different conclusion from the state court as to what the parties' rights should be under the state law its decision will not change those rights which will necessarily remain what the state court has declared them to be."

See *Flitcroft* v. *Commissioner*, 328 F. 2d 449 (9th Cir. 1964); *Estate of Darlington* v. *Commissioner*, 302 F. 2d 693 (3d Cir. 1962); *Eisenmenger* v. *Commissioner*, 145 F. 2d 103 (8th Cir. 1944); *Sharpe* v. *Commissioner*, 107 F. 2d 13 (3d Cir. 1939), cert. denied, 309 U. S. 665 (1940).

It may fairly be said, we think, that the question is an open one in this circuit. (However, compare *Kelly's Trust* v. *Commissioner*, 168 F. 2d 198 (2d Cir. 1948).) The decision in *Second National Bank* v. *United States*, 351 F. 2d 489 (2d Cir. 1965), was based, as the court makes [fol. 68] clear,[5] on the holding that the determination

[5] "The trial court after carefully considering the arguments and the many relevant decisions concluded that 'the decrees of the Connecticut Probate Court—which is not a court of record and most of the judges of which are laymen, not lawyers—under no circumstances can be construed as binding and conclusive upon a federal court in construing and applying the federal revenue laws.' 222 F. Supp. at 457. This court is in accord with the trial court's conclusion as to the effect of the state decree, see Estate of Peyton v. Commissioner, 323 F. 2d 438 (8th Cir. 1963), since under Connecticut law the Probate Court's decisions are not binding on the state's higher courts, Heiser v. Morgan Guaranty Trust Co., 150 Conn. 563, 192 A. 2d 44 (1963), and are even subject to collateral attack in another probate district, Culver's Appeal from Probate, 48 Conn. 165, 172-174 (1880). Under the circumstances, it was necessary 'to make a finding as to whether the proceedings in the Probate Court were collusive or nonadversary in nature' and the court properly refrained from so doing." 351 F. 2d at 494.

of the Connecticut Probate Court was not authoritative in Connecticut.

An able Tax Court judge quite explicitly undertook to balance several relevant factors (see pp. 2494-2495 *supra*) before deciding to accept the New York judgment as authoritative of the rights of parties. We, too, have considered all of the circumstances and feel that the decision below was correct. We hold that the New York judgment, rendered by a court which had jurisdiction over parties and subject matter, authoritatively settled the rights of the parties, not only for New York, but also for purposes of the application to those rights of the relevant provisions of federal tax law. Mrs. Bosch now has a general power of appointment under the trust. The corpus of the trust therefore qualifies for the marital deduction.

The decision of the Tax Court is affirmed.

FRIENDLY, *Circuit Judge* (dissenting):

The Commissioner's appeal concerns an important problem in the administration of the revenue laws—the conclusiveness of a judgment of a lower state court, typically in an intra-family setting, that determines property interests entailing federal tax consequences. The Supreme [fol. 69] Court has not spoken to the point for nearly thirty years. Difficulties arise because of the practical unacceptability of the strictly logical polar positions; that the judgment of an inferior state court not binding as *res judicata* can never be more than rebuttable evidence of state law, and that any such judgment which is effective as a determination of property rights among the parties is conclusive upon the federal fisc. The former position could operate unfairly in the many cases where persons having a genuine controversy over property rights desire resolution by an appropriate local tribunal without wishing to press their differences to the highest court of the state. The latter would permit citizens, unwilling to accept the tax consequences of actions taken by them or their decedents, to evade federal taxes by taking advantage of an unwitting lower state tribunal.

The compounding of factual variables, the somewhat intractable nature of the problem, and the cryptic character of the Supreme Court's rather dated pronouncements, see *Freuler* v. *Helvering*, 291 U. S. 35, 43-47 (1934); *Blair* v. *C. I. R.*, 300 U. S. 5, 9-10 (1937); and *Sharp* v. *C. I. R.*, 303 U. S. 624 (1938), have created widespread conflict among the circuits. *Contrast, e.g., Saulsbury* v. *United States*, 199 F. 2d 578 (5 Cir. 1952), cert. denied, 345 U. S. 906 (1953); *Stallworth's Estate* v. *C. I. R.*, 260 F. 2d 760 (5 Cir. 1958); *Sweet's Estate* v. *C. I. R.*, 234 F. 2d 401 (10 Cir.), cert. denied, 352 U. S. 878 (1956); and *Faulkerson's Estate* v. *C. I. R.*, 301 F. 2d 231 (7 Cir.), cert. denied, 371 U. S. 887 (1962), refusing to give effect to state judgments, *with Gallagher* v. *Smith*, 223 F. 2d 218 (3 Cir. 1955); *Darlington's Estate* v. *C. I. R.*, 302 F. 2d 693 (3 Cir. 1962), and *Goodwin's Estate* v. *C. I. R.*, 201 F. 2d 576 (6 Cir. 1953), doing the opposite. The Fourth Circuit has declined to [fol. 70] give effect to a lower state court judgment with respect to a widow's power of appointment rendered under circumstances quite similar to those here, *Pierpont's Estate* v. *C. I. R.*, 336 F. 2d 277, 281-82 (1964), cert. denied, 380 U. S. 908 (1965), distinguishing its earlier decision in *Pitts* v. *Hamrick*, 228 F. 2d 486 (1955), and expressly refusing to follow the rule of the Third Circuit which my brothers adopt. The Eighth Circuit seems to be less deferential to state judgments now than it used to be. *Contrast Straight's Trust* v. *C. I. R.*, 245 F. 2d 327 (1957), and *Peyton's Estate* v. *C. I. R.*, 323 F. 2d 438 (1963), *with Helvering* v. *Rhodes' Estate*, 117 F. 2d 509 (1941); and *Eisenmenger* v. *C. I. R.*, 145 F. 2d 103 (1944). The Ninth Circuit appears to be more so. *Contrast Flitcroft* v. *C. I. R.*, 328 F. 2d 449 (1964), *with Newman* v. *C. I. R.*, 222 F. 2d 131 (1955), and *Wolfsen* v. *Smyth*, 223 F. 2d 111 (1955). The conflict among the judges is echoed among the commentators. Most of them disapprove the acquiescent attitude now identified with the Third Circuit. See, e.g., Cardozo, Federal Taxes and the Radiating Potencies of State Court Decisions, 51 Yale L. J. 783 (1942); Cahn, Local Law in Federal Taxation, 52 Yale L. J. 799, 818-19 (1943); Oliver, The Nature of

the Compulsive Effect of State Law in Federal Tax Proceedings, 41 Calif. L. Rev. 638 (1953); Stephens and Freeland, The Role of Local Law and Local Adjudications in Federal Tax Controversies, 46 Minn. L. Rev. 223, 242-51 (1961); Braverman & Gerson, The Conclusiveness of State Court Decrees in Federal Tax Litigation, 17 Tax L. Rev. 545 (1962); Note, Effect of State Court Decrees in Federal Tax Litigation: A Proposal for Judicial Reform, 30 U. Chi. L. Rev. 569 (1963); Sacks, The Binding Effect of Nontax Litigation in State Courts, N. Y. U. [fol. 71] 21st Inst. on Fed. Tax 277 (1963). But the Third Circuit also has a defender. See Note, The Binding Effect of a Nonadversary State Court Decree in a Federal Tax Determination, 33 Fordham L. Rev. 705 (1965). With our own court uncommitted,[1] I regret my brothers' vote to align ourselves with the rather mechanical view of the Third Circuit rather than the more realistic one of the Fourth and Fifth, thereby needlessly handicapping the Commissioner in the fair and equal enforcement of the federal revenue laws. I would hold that when it is evident that state court litigation has been brought primarily to have an effect on federal taxes, the judgment of an inferior state court adjudicating property rights is entitled to little weight, and that when the state court has not had the benefit of a fair presentation of both sides of the controversy, it is entitled to none. While these principles will not resolve all cases, they are ample to decide this one.

When Herman Bosch died in 1957, the critical date for determining taxes on his estate, his wife had only a special power of appointment over the trust whose status is here in question. Admittedly this was all she purported to have and all she or her husband thought she had. So long as Mr. Bosch lived, no one had questioned the validity of the partial release of the quandam general power, least of all the experienced attorneys who had recom-

[1] The decision in *Kelly's Trust* v. *C.I.R.*, 168 F. 2d 198 (2 Cir. 1948), is inapposite in my view since the deference given to the state court adjudication was on the basis that its "appeal made it adversary, . . . especially as, on appeal from the state-court judgment, one judge dissented." 168 F. 2d at 198-99.

mended it. Nor was there any basis for doing so. There had indeed been New York decisions that a power of appointment by will, whether or not contingent on the [fol. 72] donee's surviving the donor, could not be released since this would defeat the purpose of preserving the donee's freedom of action until death. *Learned* v. *Tallmadge*, 26 Barb. 443 (1856); *Farmers' Loan and Trust Co.* v. *Mortimer*, 219 N. Y. 290 (1916). But, upon enactment of the Revenue Act of 1942, thenceforth taxing all property subject to a preexisting general power of appointment unless this was released by a specified date,[2] New York's legislature moved swiftly to permit holders to rid themselves of such powers in whole or in part. The statute, Real Property Law § 183, was phrased in the broadest terms:

> "Any power which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power in trust which is imperative, is releasable . . . with respect to the whole or any part of the property subject to such power and may also be released in such manner as to reduce or limit the persons or objects, or classes or persons or objects, in whose favor such power would otherwise be exercisable."

Nothing in the language suggests a desire to except powers that were, like Mrs. Bosch's, contingent on the donee's surviving the settlor or destructible by the settlor's amending or revoking the trust;[3] "exercisible"

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[2] Initially this was January 1, 1943, 56 Stat. 944. Later Congress successively granted postponements until November 1, 1951, and made clear that a partial release would qualify. See Powers of Appointment Act of 1951. 65 Stat. 91; S. Rep. No. 382, 82d Cong., 1st Sess. 2-8, 1951 U. S. Code Cong. & Ad. News 1530-37; Int. Rev. Code of 1954, § 2041(a)(1).

[3] We have been cited to no New York cases that had ever drawn this distinction. The one New York case cited by the Supreme Court Justice, *In re Piffard*, 111 N. Y. 410 (1888), held that although a power of appointment granted by will could not have been exercised as such by a donee who predeceased the testator, the latter's will should be read as incorporating the legatee's disposition.

[fol. 73] would not normally be read as including only cases where the exercise would be effective if the donee died the next minute. And there can be no reason why New York's legislature should thus fail in part to enable its citizens to do what Congress contemplated they might. Unless such a contingent power was partially released before the end of the grace period accorded by Congress, the settlor's death would leave the donee in the same unenviable position as any other holder of a general power created on or before October 21, 1942, where any exercise, although in favor of persons other than the donee, his estate, or their creditors, would result in the inclusion in his estate of the property over which he held the power—just what the release here suggested by the trustee in October 1951 was meant to avoid. Since there is no apparent reason why the New York legislature should have wished to discriminate against holders of contingent or revocable powers and the language affords no indication that it did, it is not surprising that what appears to be the only New York case raising the problem in a truly adversary context held that the contingent nature of a power of appointment, in that instance upon death of the donee without issue, did not prevent release under § 183, *In re Woodcock's Will*, 19 Misc. 2d 268, 186 N. Y. S. 2d 447, 450 (Surr. Ct. Westchester Co. 1959).[4] This was the unpropitious background in which the at- [fol. 74] torneys who had counseled that Mrs. Bosch convert her general power into a special one in 1951 determined to engage in what the Commissioner has aptly characterized as *post mortem* estate planning, regaining

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[4] Any shadow of doubt has been dissipated by § 146 of the new Article 5 of the Real Property Law, added by Laws 1964, c. 864, effective June 1, 1965, which was not called to the attention of the Tax Court—or to us. This section provides that the donee of a power not presently exercisable cannot contract to make an appointment but "the provisions of this section shall not, in any way, abridge the ability of the donee of a power of appointment not presently exercisable, to release his power, in whole or in part, pursuant to the provisions of section one hundred and forty-three . . ." Section 143 is old § 183. It is thus apparent that no other New Yorker in Mrs. Bosch's situation can ever obtain a ruling like that made here.

for her through the New York courts a general power she no longer had at Mr. Bosch's death.

The only reason advanced by the trustee for seeking a declaration as to the validity of the release was the effect on the trust's liability for its share of the taxes on Mr. Bosch's estate—allegedly only $930 if the release was not valid but $21,479 if it was. The trustee's petition to the New York court gave no reason why determination of that question by the Tax Court in the litigation there pending would not fully protect it. The brief for Mrs. Bosch, joining in the trustee's request that the release be declared invalid, made no suggestion that she desired to avail herself of the released power to appoint by will to herself, her estate or her creditors. Indeed, her regaining the general power made it less likely that she would exercise it in any respect. Under the Internal Revenue Code of 1954, § 2041(a)(1), while any exercise of the power would cause the trust property to be included in her estate, failure to exercise it would produce the optimum result of availability of the trust property for the marital deduction in Mr. Bosch's estate and freedom from taxation in his widow's—a feat which could not have been accomplished by revocation of the trust during Mr. Bosch's life. In default of appointment the trust was to be divided equally between the then next of kin of the two spouses; the interest of the many persons cited as presumptive remaindermen, taken as a class, thus also favored a declaration of invalidity which would make exercise in favor of Mrs. Bosch's relatives less likely, as [fol. 75] was conceded in the brief filed by a guardian *ad litem* for a relative of Mr. Bosch, the only remainderman to take a position. Mrs. Bosch in no way indicated that if the release was held valid, she would exercise her special power in favor of any particular person, who might thus be interested in urging validity. The briefs, filed by the trustee, Mrs. Bosch and the guardian, treated the invalidity of the release as almost beyond reasonable debate. The attorneys for the trustee did not inform the court on what basis they had recommended action in 1951 which they now considered so plainly a nullity—something as to which they would have been questioned sharp-

ly in a truly adversary proceeding. The sole relevant authority, *In re Woodcock's Will, supra,* was not cited, and the legislative purpose behind § 183 was not explored. Under these circumstances it is not to be wondered that a judge sitting in the busy motion part of the Supreme Court for New York County should have erroneously ratified the parties' unanimous contention, citing only the inapposite decision of *In re Piffard,* see n. 3.

The case thus fits perfectly the description cited by way of contrast in *Freuler* v. *Helvering, supra,* where "all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional . . . tax." 291 U.S. at 45. The problem in this area has been bedeviled by iteration of terms such as "collusive" or "non-adversary." To require proof of collusion in the normal sense of prearrangement would impose a nigh impossible burden on the Commissioner; yet a court shrinks from using such an opprobrious epithet when no prearrangement has been shown. Again, while a proceeding in which, for example, a life tenant with what appears to be a limited right to invade princi- [fol. 76] pal seeks a declaration of absolute ownership is surely "adversary" in a formal sense, it may not be in a practical one, as when the life tenant is an aged mother seeking to qualify a bequest for the marital deduction and the remaindermen are her adult sons. See *Peyton's Estate* v. *C. I. R., supra,* 323 F. 2d 438. What makes this case so easy is that the state court proceeding had no significant purpose other than the reduction of tax liability; Mrs. Bosch was not shown to have the slightest intention of using the general power the New York court was led to thrust upon her, or even the special one if she was held to have only that. In a practical sense the decision was thus devoid of any effect except on taxes.[5] There was

[5] It is immaterial that if Mrs. Bosch should choose to exercise the power in favor of her own relatives, she would subject her estate to a tax—apparently much smaller than the sum here at issue—which would have been saved if the release had not been attacked. The *post mortem* estate planning condemned in *Pierpont's Estate* v. *C. I. R., supra,* 336 F. 2d 277, and *Peyton's Estate* v. *C. I. R., supra,* 323 F. 2d 438, would also have increased the estate tax payable on the widow's death.

no question affecting the integrity of the corpus, as in *Freuler*, or the assignability of the beneficiary's right to income, as in *Blair* v. *C. I. R.*, *supra*. In such a case the considerations for respecting the determination of a lower court which is not the product of a weighing of opposing arguments approach zero.[6] One well-considered article has said: "Whenever all parties to the state court pro- [fol. 77] ceeding approve and have never opposed the proffered result, and the decree embodying it appears to serve no purpose other than to avoid federal taxation, the decree should not be regarded as determinative of the state law property rights purportedly adjudicated." Braverman & Gerson, *supra*, 17 Tax L. Rev. at 576. Another comment suggests that "if a taxpayer, intending to avoid tax liability, institutes a state suit, and if no interested party presents the argument urged by the Commissioner, then the state court judgment should be considered to have been collusively obtained." Note, *supra*, 30 U. Chi. L. Rev. at 581. A third proposes that a state court adjudication of property rights be respected "unless it was obtained by collusion, i.e., for the sole and single purpose of defeating the federal tax imposed upon those rights." Sacks, *supra*, N. Y. U. 21st Inst. on Fed. Tax. at 295. It is unnecessary to choose among these formulations; all call for reversal here.

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[6] I fail to see the significance attributed by my brothers to the Commissioner's knowledge of the New York proceeding or his courtesy in awaiting its outcome. For twenty years the announced policy of the Internal Revenue Service, surely well known to the appropriate committees of Congress, has been not to intervene in such suits and to move to dismiss if made a party. Mim. 6134 (1947). The reasons are obvious—insufficient staff, unfamiliarity with state procedures, and lack of standing to intervene and thus to appeal unless, indeed, the Commissioner were to concede the very point of the conclusiveness of the state judgment which he properly disputes. In the absence of contrary congressional direction the United States is entitled to litigate liability for federal taxes in its own courts. Compare *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220 (1957).

[fol. 78]

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

* * * *

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR, RESPONDENT

JUDGMENT—July 6, 1966

Appeals from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

[fol. 79]

* * * *

[fol. 80]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 81]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1966

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY EXECUTOR

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby extended to and including November 3rd, 1966

/s/ John M. Harlan
Associate Justice of the Supreme Court of the United States

Dated this 4th day of October, 1966

SUPREME COURT OF THE UNITED STATES

No. 673, October Term, 1966

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN J. BOSCH, DECEASED, ETC.

ORDER ALLOWING CERTIORARI—December 5, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 240.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 240592 452

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1968

No. 240

THE SECOND NATIONAL BANK OF NEW HAVEN, ETC., PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 24, 1968.
CERTIORARI GRANTED NOVEMBER 4, 1968.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 240

THE SECOND NATIONAL BANK OF NEW HAVEN, ETC., PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., DECEMBER 20, 1966

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 28,868

THE SECOND NATIONAL BANK OF NEW HAVEN, Executor of the Will of Frederick F. Brewster, late of Hamden, Deceased, Plaintiff-Appellee-Appellant,

v.

UNITED STATES OF AMERICA, Defendant-Appellant-Appellee.

(Cross Appeals)

ON APPEALS FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

Appendix to the Brief for the United States as Appellant

[File endorsement omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Docket 9435

THE SECOND NATIONAL BANK OF NEW HAVEN, Executor of the Will of Frederick F. Brewster, late of Hamden, Deceased,

vs.

UNITED STATES OF AMERICA.

For plaintiff:

Curtis K. Thompson, 205 Church St., New Haven, Conn.

For defendant:

Robert C. Zampano, Arnold Markle, Federal Building, New Haven, Conn.

DOCKET ENTRIES

DATE	PROCEEDINGS
1962	
8/29	Complaint filed. Summons issued and with copies of same and of said complaint handed Marshal for service.

[fol. 2]

8/30	Marshal's return showing service, filed.—Summons & complaint.
9/ 5	Appearance of Robert C. Zampano and Arnold Markle entered for defendant.
10/ 4	Motion for Summary Judgment under Rule 56, filed by plaintiff.
"	Affidavit of Charles E. Arntsen in Support of Plaintiff's Motion for Summary Judgment, filed.

DATE	
1962	
10/29	Answer, filed.
11/21	Notice of Motion for Summary Judgment, filed by plaintiff.
"	Memorandum in Support of Motion for Summary Judgment, filed by plaintiff.
12/10	Motion for Continuance, filed by defendant. (Continuance to second Motion Day in January, 1963 of hearing on plaintiff's Motion for Summary Judgment)
12/17	Hearing on (1) Plaintiff's Motion for Summary Judgment and (2) Defendant's Motion for Continuance. (2) Granted and (1) is continued to January 7, 1963 for Judge Timbers further consideration at that time. Anderson, *J.*
12/24	Claim for Court Trial List at New Haven, filed by plaintiff.
[fol. 3]	
1963	
1/ 4	Brief in Opposition to Plaintiff's Motion for Summary Judgment, filed by defendant.
1/ 7	Hearing on Plaintiff's motion for Summary Judgment. Plaintiff has until Jan. 11th, to file Reply Brief. Defendant until Jan. 18th to cover either by letter of brief any new matter that may be reached. Decision Reserved. Timbers, *J.*
1/11	Reply Memorandum, filed by plaintiff.
7/25	Memorandum of Decision on Plaintiff's Motion for Partial Summary Judgment, entered. Summary Judgment on the issue of liability may be entered (1) in favor of defendant on the question of the widow's allowance and (2) in favor of plaintiff

DATE

1963

on the question of proration of estate taxes. Final judgment to be entered within 30 days from the date of this decision; upon stipulation as to the form and amount of judgment, if possible; if not, the form and amount of judgment will be settled upon notice. If any issues remain unresolved after this procedure, the Clerk is directed to set the case for trial at the head of the calendar for the next session of court cases to be tried at New Haven. Timbers, *J*. Copy mailed Thompson, Weir and Barclay and 3 copies handed U.S. Attorney.

8/26 Stipulation that the time for filing a proposed judgment is extended to Sept. 10, 1963, filed. So Ordered. Timbers, *J*. Copies mailed U.S. Attorney and Attorney Thompson.

[fol. 4]

9/16 Stipulation that the time for filing proposed judgment is extended to September 20, 1963, filed. So Ordered. Timbers, *J*. Copies mailed to U.S. Attorney and Attorney Weir.

9/20 Motion for Entry of Judgment and Notice of Motion, filed by defendant.

9/23 Motion for Entry of Judgment, attached form of Judgment and Notice of Motion, filed by plaintiff.

10/ 3 Brief for the Defendant in Support of its Motion for Entry of Judgment and in Opposition to Plaintiff's Motion for Entry of Judgment, filed.

10/ 7 Hearing on (1) Defendant's Motion for Entry of Judgment and (2) Plaintiff's Motion for Entry of Judgment. Robert F. Sama, Dept. of Justice admitted for purposes of this case. Plaintiff's Memorandum in support of its motion, filed.

DATE

1963

Govt. may file reply to plaintiff's memo by 10/17/63. Decisions reserved. Timbers, *J.*

10/16 Reply Memorandum in Support of Defendant's Motion for Entry of Judgment, filed.

12/ 2 Order on Cross-Motions for Entry of Judgment, entered. Plaintiff's Motion for Entry of Judgment is granted. Defendant's Motion for Entry of Judgment is denied. It is Ordered that the Clerk enter judgment. Timbers, *J.* Copies mailed U.S. Attorney and Attorney Thompson.

[fol. 5]

12/ 2 Judgment entered that the plaintiff recover of the defendant $1,485,293.86 with interest at the rate of 6% per annum from the 29th day of May, 1962 and that this Court retain jurisdiction of this action. Earl, *C.* Copies mailed U.S. Attorney and Attorney Thompson.

1964

1/24 Notice of Appeal, filed. Copy mailed Attorney Thompson and copies returned to U.S. Attorney.

1/27 Notice of Cross-Appeal, filed. Copies handed to U.S. Attorney.

2/28 Motion for Order Extending Time to Docket Appeal and File Record, filed. Ordered Accordingly. Timbers, *J.* Copy mailed Atty. Thompson and copies handed U.S. Attorney.

4/15 Record on Appeal mailed Clerk, U.S. Court of Appeals, with two copies of Index. Copies of Index mailed Attys. Thompson and Zampano.

4/22 Receipt for Record on Appeal received from Clerk, U.S. Court of Appeals.

[fol. 6]

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed August 29, 1962

The plaintiff for its complaint herein alleges as follows:

1. This is a civil action seeking the recovery of certain monies, part of which the defendant received on December 16, 1959, and part on May 29, 1962 to and for the use of the plaintiff. It arises under the laws of the United States of America providing for internal revenue in that such monies represent federal estate taxes and interest thereon which are alleged to have been erroneously and illegally assessed and unlawfully collected. The suit is brought against the United States of America pursuant to Section 1346 (a) (1) of Title 28 of the United States Code.

2. The Second National Bank of New Haven is a corporation organized and existing under the national banking laws and is located in the City of New Haven in the State of Connecticut, and it is the executor of the last will and codicil thereto of Frederick F. Brewster, late of Hamden, Connecticut, deceased, and brings this action in its capacity as such executor.

3. Said Frederick F. Brewster died a citizen of the United States and a resident of the Town of Hamden, State of Connecticut on September 16, 1958. His last will and codicil thereto were admitted to probate by the Probate Court for the District of Hamden in the State of [fol. 7] Connecticut on October 6, 1958 and thereupon letters testamentary were issued to the plaintiff, The Second National Bank of New Haven, and to Harry E. Ross, who duly qualified as executors thereof. Said Harry E. Ross continued to serve as an executor until May 7, 1962 when his resignation as such was accepted by the Probate Court for the District of Hamden. A true copy of said will and codicil is hereto annexed and marked Exhibit A.

4. The Probate Court for the District of Hamden after hearing duly held on application of such executors, on

February 2, 1959 entered an order in the proceedings for the settlement of the estate of said decedent directing the payment to Margaret F. Brewster, the widow of said decedent, of an allowance for her support during the settlement of the estate. In compliance with such order, the executors on March 13, 1959 paid the amount of said allowance to said Margaret F. Brewster.

5. On December 16, 1959 and within the time prescribed by law, said The Second National Bank of New Haven and Harry E. Ross, as executors aforesaid, filed a federal estate tax return for the estate of said decedent with the District Director of Internal Revenue in Hartford, Connecticut and paid to him the amount of tax shown by said return to be due. In such return the executors reported that various property interests had passed from said decedent to his surviving spouse, Margaret F. Brewster, which were deductible in computing the taxable estate by virtue of Section 2056 of the Internal Revenue Code of 1954. Such property interests included the allowance referred to in paragraph 4 hereof and also the one-third [fol. 8] part of decedent's residuary estate bequeathed in trust by Part I of Article Nine of his will, computed without reduction on account of federal estate taxes attributable to such residuary estate. In such return the executors elected to have the gross estate of the decedent valued as of the alternate dates authorized by Section 2032 of said Internal Revenue Code.

6. The District Director of Internal Revenue by letter to the executors dated October 18, 1961 and an accompanying report on his examination of the federal estate tax return, notified them of certain adjustments or conclusions with respect thereto and proposed a deficiency in federal estate tax liability resulting principally from adjustments to the amount allowable as a marital deduction. Thereafter the executors, by their attorneys, filed a protest against certain of such adjustments and otherwise opposed the assessment of any such deficiency.

7. On November 10, 1961, the executors made an application to said Probate Court, pursuant to Chapter 218 of the General Statutes of Connecticut, Revision of 1958, as amended, for a determination as to how the federal estate tax on the residuary bequests should be prorated between such bequests. Such application was accompanied by a computation whereby the executors proposed a determination that the federal estate taxes attributable to the residuary estate should be charged against so much of the residuary estate as passed under Part II of Article Nine of the decedent's will and that no portion thereof should be charged against the one-third part of the residuary estate passing under Part I of said Article Nine. A true [fol. 9] copy of the aforesaid application and computation is hereto annexed and marked Exhibit B.

8. On November 15, 1961, the executors caused to be mailed, postage prepaid, to the District Director of Internal Revenue at Hartford, Connecticut a true copy of the aforesaid application of the executors and attached computation and of the order of the Probate Court for a hearing to be held thereon on November 27, 1961.

9. After hearing duly held on November 27, 1961 on said application, Exhibit B, said Probate Court entered an order which determined that the federal estate tax be prorated in the manner and in the amounts set forth in the said application of the executors and which authorized, empowered and directed the executors to charge the prorated amounts against the persons against whom the tax was so prorated as set forth in said application and computation.

10. The Commissioner of Internal Revenue, by a letter to the executors dated April 6, 1962, purported to determine a deficiency in the estate tax liability of the estate of said decedent. Such deficiency resulted in part from

(a) a purported determination that the allowance for the support of decedent's widow, referred to in paragraph

4 hereof, was not a property interest passing from the decedent to his surviving spouse within the meaning of Section 2056(a) of the Internal Revenue Code of 1954 and was not deductible from the value of the gross estate in determining the value of the taxable estate; and

[fol. 10] (b) a purported determination that the full amount of the federal estate tax on the residuary estate should not be charged against so much of the residuary estate as passed under Part II of Article Nine of the decedent's will but that the one-third part of decedent's residuary estate bequeathed in trust under Part I of Article Nine of said will and to be deducted from the value of the gross estate in determining the value of the taxable estate, should be computed after the deduction of all federal estate taxes from the residue.

A true copy of the aforesaid letter of the Commissioner of Internal Revenue dated April 6, 1962 and the statement accompanying it is hereto annexed and marked Exhibit C.

11. The purported determinations of the Commissioner of Internal Revenue, referred to in paragraph 10 hereof were erroneous and illegal and contrary to the laws of the State of Connecticut and of the United States of America.

12. On May 12, 1962, the plaintiff waived certain restrictions on the assessment and collection of the alleged deficiency in federal estate taxes, but without prejudice to the right of the executor to sue for the refund of all or any part of the tax or deficiency, by executing and delivering to the District Director of Internal Revenue a written instrument, a true copy of which is hereto annexed and marked Exhibit D.

13. Thereafter and on or about May 25, 1962, the District Director of Internal Revenue assessed additional federal estate taxes against said estate in the sum of $1,333,194.35 and demanded payment thereof by the plaintiff with interest thereon in the amount of $195,285.58 and

[fol. 11] on May 29, 1962 the plaintiff made payment of such sums under protest. A true copy of the letter of the attorneys for the executors transmitting such payment and the receipt of the District Director of Internal Revenue is hereto annexed and marked Exhibit E.

14. Such deficiency resulted from the erroneous and illegal determinations of the Commissioner of Internal Revenue, referred to in paragraphs 10 and 11, and therefore the assessment and collection of such taxes and interest thereon was unlawful.

15. On or about June 7, 1962, the plaintiff filed with the District Director of Internal Revenue at Hartford, Connecticut, a claim for the refund of such sums as had been erroneously and illegally assessed against and collected from the estate of its decedent as alleged herein, together with interest thereon. A true copy of such claim for refund is hereto annexed and marked Exhibit F.

16. The Commissioner of Internal Revenue, by letter dated August 14, 1962 and report attached thereto, notified the plaintiff of the disallowance and denial of such claim for refund. A true copy of such letter and report is hereto annexed and marked Exhibit G.

17. A reasonable amount representing fees incurred or paid by the plaintiff for services rendered or to be rendered by its attorneys in contesting the deficiency in federal estate taxes asserted by the Commissioner of Internal Revenue and in prosecuting the aforesaid claim [fol. 12] for refund of such taxes and this action may, pursuant to Section 212 and Regulations §1.212-1 (i) be deducted by the plaintiff in determining its liability for federal income taxes in the year paid or in determining the liability of said estate for federal estate taxes. Pursuant to Regulations §20.2053-3 (T.D. 6296, June 23, 1958) the plaintiff states that it may claim such deduction in determining the federal estate tax liability.

18. By reason of the premises, the defendant had and received monies of the plaintiff and became indebted to it in a sum exceeding $1,600,000 with interest as follows:

(a) on $1,333,194.35 from May 29, 1962;

(b) on $195,285.58 from May 29, 1962; and

(c) on all amounts in excess of the foregoing from December 16, 1959.

The defendant has not paid said sum or any part thereof to the plaintiff or the estate of its decedent and the amount thereof remains due and owing from the defendant to the plaintiff.

Wherefore, the plaintiff prays that this Court adjudge:

(1) whether the aforesaid allowance paid by the executors and referred to in paragraph 4 above was a property interest that passed from the decedent to his surviving spouse within Section 2056 of the Internal Revenue Code of 1954 and was deductible from the value of the gross estate in computing the taxable estate;

[fol. 13] (2) whether any part of the federal estate tax attributable to the residue of the estate should operate to reduce the value of the property passing to the surviving spouse of the decedent under Part I of Article Nine of the will of said decedent as altered by the codicil thereto;

(3) the amount of the overpayment of federal estate taxes and interest thereon made by the plaintiff; and

(4) that the plaintiff have judgment against the defendant in the amount of such overpayment of federal estate taxes and interest with interest thereon from the dates of overpayment.

Curtiss K. Thompson, of Thompson, Weir & Barclay, 205 Church Street, New Haven, Connecticut, Attorneys for Plaintiff.

[fol. 14]

IN UNITED STATES DISTRICT COURT

EXHIBIT A, ANNEXED TO COMPLAINT

LAST WILL AND TESTAMENT

of

FREDERICK FOSTER BREWSTER

Date: June 5th, 1958

I, Frederick Foster Brewster, of the Town of Hamden, County of New Haven and State of Connecticut, do make, publish and declare this to be my last will and testament, hereby revoking all wills and codicils thereto heretofore made by me.

ONE: I direct my executors hereinafter named to pay out of my estate my just debts and funeral expenses and any death taxes which may be legally assessed upon or with respect to any property which is required to be included in my gross estate under the provisions of any death tax law. The provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries of this will or the transferees of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate.

TWO: I give, devise and bequeath to my wife, Margaret F. Brewster, the use of our home, known as Edgerton, consisting of lands and buildings located on Whitney Avenue, in the Towns of Hamden and New Haven, during her [fol. 15] lifetime or until such time as she chooses not to occupy the property and so notifies the Trustee of the trust fund created in Part I of Article Nine hereof.

Upon termination of my wife's use of such real property, I give and bequeath the collection of twenty-four bird pictures, painted by Louis Agassiz Fuertes mounted in the study of my home, to Cornell University, in Ithaca,

New York, and the said Trustee shall cause the same to be transferred and delivered to it. I believe the enjoyment of these paintings will be enhanced if viewed in a quiet and restful environment and, accordingly, if Cornell University should wish to exhibit them in a room such as my study and for which they were commissioned to be made, I also give and bequeath to it the teak paneling, flooring, doors, windows, fireplace and other fixtures and structures with which such room is finished and the sum of Thirty Thousand Dollars ($30,000.), so that the study may be substantially reconstructed in a building of the University.

Upon termination of my wife's use of such real property, I direct the said Trustee to cause the dwelling house to be razed and the ground on which it stood to be suitably graded and seeded; and, I then give, devise and bequeath such real property with the improvements thereon to the City of New Haven, a municipal corporation of the State of Connecticut, to be forever held by it and used as a public park and for no other use whatever. If such gift is accepted by the City, I direct that said Trustee in its discretion may cause such repairs and improvements to be made to the Gate House on the property that it will be reasonably suitable as a residence for a park superintendent. If the City of New Haven does not accept such [fol. 16] gift, I give, devise and bequeath such real property to the aforesaid Trustee to be held as part of the trust fund created in Part I of Article Nine hereof, and to follow the disposition thereof.

I also give and bequeath to Cornell University the booklet which Louis Agassiz Fuertes prepared and submitted to me entitled, "Preliminary Studies for Decorative Panels; House of F. F. Brewster, New Haven, Connecticut".

All sums of money required to effectuate the provisions of this Article shall be paid by said Trustee out of the principal of the trust fund created in Part I of Article Nine hereof.

THREE: I give and devise to my wife, Margaret F. Brewster, to be hers absolutely, our summer home in Dublin, New Hampshire, known as Morelands, and also two (2) pieces of land with a house on each located in New Haven, at No. 26 Burns Street and at No. 80 Cliff Street.

FOUR: I give and bequeath to my wife, Margaret F. Brewster, such of the contents, furnishings and equipment of our homes Edgerton and Morelands, as I may own, and also all of my automobiles, paintings and works of art, silver and other plate, books, jewelry, watches, clocks, furniture, guns, dogs, wearing apparel, and all my personal effects of every kind and description, excepting, however, the paintings and booklet described in Article Two and any supplies, furnishings, tools and equipment located at Brookfield Farm in Durham.

FIVE: (A) I give and bequeath to each of the persons hereinafter named, provided he or she shall be in the em- [fol. 17] ploy of my wife or myself at the time of my death or shall be receiving a pension or retirement pay from either of us at that time, the sum set against his or her name, to wit:

(1) To Harry E. Ross, Fifty Thousand Dollars ($50,000).

(2) To Philip J. Rich, Ten Thousand Dollars ($10,000).

(3) To Alvin F. Rich, Ten Thousand Dollars ($10,000).

(4) To George M. Finnie, Ten Thousand Dollars ($10,000).

(5) To John Churchill, Ten Thousand Dollars ($10,000).

(6) To William Sutherland, Ten Thousand Dollars ($10,000).

(7) To Hugh A. Young, Bernard K. Barrett and George Jones, Ten Thousand Dollars ($10,000) each.

(8) To George S. Watrous, Five Thousand Dollars ($5,000).

(9) To Margaret Winter, Four Thousand Dollars ($4,000).

I direct that the acceptance of any one of the foregoing bequests shall exclude the recipient from the benefit of the provisions of Article Six.

(B) I give and bequeath to Beatrice Trower, Clara Margaret Peterson, Florence Lyon Tessie Mae Lintzner, [fol. 18] Mary Ellen Hughes and Marie Walsh Barrett, One Thousand Dollars ($1,000) each. Because their employment has been intermittent only, these persons are not mentioned in sub-division (A) hereof and are not within the provisions of Article Six. These bequests are made upon condition that the recipient shall have been employed by me or by my wife either steadily or intermittently during the twelve-month period immediately preceding my death.

Six: I give to each person who at the time of my death shall be actively employed by my wife or by me at our homes Edgerton, or Morelands, or my farm in Durham, Connecticut, known as Brookfield Farm, a sum of money which shall be determined as follows: the sum of One Hundred Dollars ($100) for each year of active service in such employment to and including five, plus the sum of One Hundred Fifty Dollars ($150) for each additional year of active service in such employment to and including fifteen, plus the sum of Two Hundred Dollars ($200) for each additional year of active service in such employment to and including twenty-four; but if such person has been in such employment for twenty-five or more years, such sum shall be Five Thousand Dollars ($5,000). In determining the length of service of any person, I direct that an absence of not more than three months due to illness or authorized vacation shall not be deemed to have inter-

rupted the employment, and that the year of my death and the year of entering the employment shall be considered as one year.

SEVEN: I give and bequeath to my friend, Roger P. Tyler, the sum of Twenty Thousand Dollars ($20,000).

[fol. 19] EIGHT: The omission from this my will of any provision for my oldest son John Brewster is intentional and for causes which do not reflect any estrangement between us.

NINE: All the rest, residue and remainder of my estate, of whatever kind and wherever located, shall be distributed as hereafter directed:

Part I. One-third (⅓) thereof, I give, devise and bequeath to the trustee hereafter named, but upon trust, to pay the net income therefrom to my wife, Margaret F. Brewster, quarterly, during her lifetime, and upon her death to convey, assign, transfer and pay over, free of trust, the properties constituting the principal of such trust fund and any accrued or unexpended income, in equal shares, to my children Elmina, Frederick and William, or their survivors or survivor; provided, however, that if any child is then deceased having left issue then surviving, such issue shall take equally, *per stirpes,* the share such child would have received had he or she survived. I further direct and authorize the trustee to use and expend so much of the principal of the trust fund as is required to effectuate the provisions of Article Two hereof.

Part II. Two-thirds (⅔) thereof I give, devise and bequeath to the trustee hereafter named, upon trust, for the uses and purposes hereafter stated:

(a) The trustee shall divide the properties constituting such two-thirds (⅔) part into as many equal shares as are necessary to provide one for each of my grandchildren then surviving. Each of such shares shall constitute a trust fund for and be designated with the name of one [fol. 20] of such grandchildren. Each of the trust funds

thus established shall continue until the grandchild for whom designated attains the age of thirty (30) years or dies, whichever event shall first occur, and thereupon such trust shall terminate.

(b) The net income of each fund, in the discretion of the trustee, may be used and expended for the support, maintenance, education and welfare of the grandchild for whom designated, or it may be accumulated and from time to time added to the principal of the fund. If the trustee in its discretion pays such net income or a part thereof to the guardian of such grandchild or to the person with whom such grandchild is residing, it shall not be required to account further for the same. If a grandchild is twenty-one years of age or later attains that age, the trustee shall thereafter and until the termination of the trust pay one-half (½) of the net income of his or her fund, in quarterly instalments, to such grandchild.

(c) Upon termination of such a fund by reason of the grandchild for whom designated attaining the age of thirty (30) years, the principal thereof, including any additions thereto and any accumulated, unexpended or accrued income thereof, shall be conveyed, assigned, transferred and paid over to such grandchild, freed and discharged of all trust.

(d) Upon termination of such a fund by the death of the grandchild for whom designated, the principal thereof, including any additions thereto and any accumulated, unexpended or accrued income thereof, shall be conveyed, assigned, transferred and paid over to the person or persons appointed and in the amounts or proportions pre-
[fol. 21] scribed by such grandchild in exercising the power of appointment granted for the remainder of such fund in paragraph (e) hereof; or if such grandchild has not effectually or completely exercised such power, then such property as is not disposed of, shall be conveyed, assigned, transferred and paid over to the then surviving issue of

such grandchild, in equal shares, *per stirpes,* freed and discharged of all trust; or, if there be no such surviving issue, then such property shall be divided into as many equal parts as are necessary to provide one part for each similar fund that then exists hereunder or that has terminated and has been distributed, and one of such parts shall then be conveyed, assigned, transferred and paid over to the trustee of each such fund then in effect to be added to the principal and follow the disposition thereof and to the person or persons to whom a fund has been distributed, or their executors or administrators, and in the same proportions as were used in such prior distribution.

(e) I give and grant to each grandchild for whom a fund is designated the right and power by his or her last will to appoint the person or persons who, upon his or her death before attaining the age of thirty (30) years, shall receive the remainder of such fund; and further, to prescribe the amounts or proportions of such remainder to be received by such person or persons; but I require that such right and power shall not be exercised by such a grandchild in favor of himself or herself, or his or her estate, or creditors, or the creditors of his or her estate, or in favor of any person who is not his or her spouse or a descendant of mine.

[fol. 22] TENTH: I hereby constitute and appoint The Second National Bank of New Haven, a corporation organized under the banking laws of the United States and located in the City of New Haven, the trustee under Article Nine of this my will. In the administration of the trust funds created in such article, the trustee shall have the powers hereafter set forth:

(a) The trustee shall have full power and authority to hold and manage the assets of such funds and to sell, exchange or otherwise dispose of them or any part thereof, whether real or personal, for cash or upon credit, and

upon such terms and conditions and for such prices or other considerations, including stocks, bonds or other securities of any corporation, as in its discretion are fair and reasonable; to invest and reinvest the assets of the funds in stocks, bonds, securities and other property, real or personal; to borrow money and to mortgage or hypothecate all or any part of the assets of the funds to secure such borrowings; to vote any corporate stock held in any fund, by proxy or other representative, with or without the power of substitution; to take part in reorganizations, sales, mergers, consolidations, foreclosures and liquidations of corporations the stocks, bonds or other securities of which may be held in any fund and to deposit such stocks, bonds or other securities with protective committees or otherwise to secure the payment or adjustment thereof; to erect, repair, alter, rebuild, remove or demolish buildings or other improvements on any real property that may become a part of any fund; to lease lands and buildings for terms not exceeding ninety-nine (99) years [fol. 23] and not terminable at the termination of the trust on any proper rental basis; to retain and employ counsel and attorneys, accountants, bookkeepers, clerks, architects and such other agents or labor as the trustee may deem desirable; to make, execute and deliver all deeds, assignments, conveyances, contracts, mortgages, bills of sale and such other instruments as shall be necessary or convenient in exercising powers granted to it and in effectuating the purposes of the funds.

(b) The trustee shall be entitled to compensation for its services, in such amounts and proportions as it shall determine, in the exercise of its discretion, to be fair and reasonable; and further, it shall have power to determine whether such compensation is payable out of income or principal.

(c) The trustee shall have power and authority to make every division and distribution necessary in the establishment, administration and settlement of the funds without

the appointment of distributors and without converting any property into cash, to make all appraisals required for such purposes, and to divide, set apart and distribute property in such manner as shall be determined by it, in the exercise of its discretion, to be fair and equitable.

(d) No purchaser of any property sold by the trustee and no transfer agent or registrar of securities bought or sold by the trustee shall be under any duty to inquire into the validity or propriety of such purchase or sale or to follow the application or disposition by the trustee of any sum of money paid to it.

[fol. 24] (e) All the rights, powers, privileges and immunities granted to the trustee named in this article may be exercised and enjoyed by any bank or trust company that might be appointed successor trustee.

ELEVEN: I hereby appoint said The Second National Bank of New Haven and Harry E. Ross, of New Haven, Connecticut, or their survivor, to be the executors of this my last will. I hereby authorize and empower my said executors, their survivor and successors, to make every division and distribution required by this will without the appointment of distributors and without requiring the conversion of any property into cash; and, for the purpose of every such division and distribution they may make appraisal, set apart and distribute property as and in such manner as shall be determined by them, in the exercise of their discretion, to be equitable, pursuant to the provisions of this will. I further authorize and empower them to lease and mortgage any part or all of the property of my estate, real or personal, not herein specifically bequeathed and to sell and convey the same upon such terms as they may deem expedient and if it appears that settlement of the estate will be protracted, to invest and reinvest any part of the assets thereof. I also authorize and empower them to continue the operation of my farm in Durham, known as Brookfield Farm, if in their judgment

that will facilitate a sale thereof, and any deficit incurred in the operation thereof shall be paid out of my estate as an expense of administration; but I direct my executors to grant to my children, or any one of them who wishes, an option to purchase the stables on such farm, their contents, and so much of the surrounding land as such [fol. 25] child or children wish, within six (6) months following my death, at the price for which the same may have been appraised in the inventory of my estate.

I direct that my said executors, or either of them, shall not be required to give any bond or other security for the faithful performance of their duties as such executors in any state or states where it may be necessary or convenient to make proof of this my last will.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal, at Hamden, Connecticut this 5th day of June, 1958.

/s/ Frederick Foster Brewster (L.S.)

Signed, sealed, published and declared by the within-named testator, Frederick Foster Brewster, to be his last will and testament, in the presence of us and each of us who, in his presence and in the presence of each other and at his request, have hereunto subscribed our names as witnesses.

/s/ E. Virginia Punzelt	32 High St., New Haven, Conn.
/s/ H. Donald Harris, Jr.	524 Whitney Ave., New Haven, Conn.
/s/ Frank C. Royer, Jr.	86 Cottage St., New Haven, Conn.

[fol. 26]
State of Connecticut,
County of New Haven—ss.:

Personally appeared E. Virginia Punzelt, H. Donald Harris Jr. and Frank C. Royer Jr. who, being duly sworn, depose and say that they witnessed the execution of the within will of the within-named testator, Frederick Foster Brewster; that said testator subscribed said will and declared the same to be his last will and testament in their presence; that they thereafter subscribed their names as witnesses at the request of said testator in his presence and in the presence of each other; that said testator at the execution of said will appeared to them to be of full age and of sound mind and memory, not under any restraint and competent in every respect to make a will; and that they make this affidavit at the request of said testator.

/s/ E. Virginia Punzelt

/s/ H. Donald Harris Jr.

/s/ Frank C. Royer, Jr.

Subscribed and sworn to
this 5th day of June, 1958,
before me,

/s/ Curtiss K. Thompson
Notary Public

[fol. 27]

CODICIL

To

Last Will and Testament

Dated

June 5, 1958

of

Frederick F. Brewster

Dated: July 1st, 1958

I, Frederick F. Brewster, of the Town of Hamden, County of New Haven, State of Connecticut, do make, publish and declare this to be a codicil to my last will and testament dated June 5, 1958.

First: I hereby amend Article Two of my said will in the following respects:

(a) The concluding words of the first paragraph of such article which read, "in Part I of Article Nine hereof" are hereby deleted, and in place of them is substituted the word "herein".

(b) The last paragraph of said Article Two is hereby deleted and in place thereof is substituted the following:

> I give and bequeath the sum of One Hundred Thousand Dollars ($100,000) to the trustee named in Article Ten hereof, and with the powers therein [fol. 28] set forth, upon trust, to hold the same and accumulate the income, and to use and expend both principal and income to effectuate the provisions of this article, and to transfer or pay over any unexpended balance to the several trusts created in Part II of Article Nine hereof, in equal shares.

SECOND: I hereby amend Part I of Article Nine of my said will to read as follows:

Part I. One-third (⅓) thereof I give, devise and bequeath to the trustee hereafter named, but upon trust, to pay the net income therefrom to my wife, Margaret F. Brewster, quarterly, during her lifetime, and upon her death to transfer and pay over the entire principal to such persons, corporations or other parties, including her own estate, and in such amounts or proportions, whether outright, by way of trust or otherwise, as my wife may designate and prescribe in her last will and testament; but if such power is not effectually or completely exercised, then such principal or so much as is not distributable pursuant to the exercise of such power, shall be transferred and paid over, in equal shares, to my children, Elmina, Frederick and William, or their survivors or survivor; provided, however, that if any child is then deceased having left issue then surviving, such issue shall take, equally, *per stirpes,* the share such child would have received had he or she survived.

THIRD: In all other respects I hereby republish and confirm my said will.

[fol. 29] IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal, at Hamden, Connecticut, this 1st day of July, 1958.

/s/ Frederick F. Brewster (L.S.)

Signed, sealed, published and declared by the within-named testator, Frederick F. Brewster, to be a codicil to his will dated June 5, 1958, in the presence of us and each of us who, in his presence and in the presence of each other

and at his request have hereunto subscribed our names as witnesses.

/s/ Fanny G. Tyler	East Haven, Conn.
/s/ E. Virginia Punzelt	32 High St., New Haven, Conn.
/s/ H. Donald Harris, Jr.	New Haven, Connecticut

State of Connecticut,
County of New Haven—ss.:

Personally appeared Fanny G. Tyler, E. Virginia Punzelt and H. Donald Harris Jr. who, being duly sworn, depose and say that they witnessed the execution of the within codicil of the within-named testator, Frederick F. Brewster; that said testator subscribed said codicil and declared the same to be a codicil to his last will and testament dated June 5, 1958, in their presence; that they thereafter subscribed their names as witnesses at the request of said testator, in his presence and in the presence of each other; [fol. 30] that said testator, at the execution of said codicil, appeared to them to be of full age and of sound mind and memory, not under any restraint and competent in every respect to make a will or codicil, and that they make this affidavit at the request of said testator.

/s/ Fanny G. Tyler

/s/ E. Virginia Punzelt

/s/ H. Donald Harris Jr.

Subscribed and sworn to
this 1st day of July, 1958,
before me,

/s/ Curtiss K. Thompson, Notary Public

IN UNITED STATES DISTRICT COURT

EXHIBIT B, ANNEXED TO COMPLAINT

November 15, 1961

District Director of Internal Revenue
Hartford, Connecticut

Re: Estate of Frederick F. Brewster

Dear Sir:

The Executors of the estate of Frederick F. Brewster have filed with the Probate Court for the District of Hamden a first administration account and an application for determination of proration of federal estate tax. A [fol. 31] copy of the notice of hearing is enclosed herewith as is a copy of the application for determination of proration of federal estate tax. You will note that the Court has set the hearing for Monday, November 27th, at 2 P.M.

Very truly yours,

/s/ JOHN H. WEIR

JHW:rn
Enc.

To the Probate Court for the District of Hamden:

Estate of FREDERICK F. BREWSTER, late of Hamden, in said District, deceased.

APPLICATION FOR DETERMINATION OF PRORATION OF FEDERAL ESTATE TAX

The subscribers, Executors of the will of said deceased, respectfully represent:

1. They have prepared the attached computation of proposed proration of the Federal Estate Tax (as shown in

the Federal Estate Tax Return corrected in the respects set forth in the notes to said computation), pursuant to the provisions of Chapter 218 of the General Statutes of Connecticut, Revision of 1958, as amended.

2. They desire to set up the residuary trusts in part and to set aside the residuary share of the widow, Margaret F. Brewster, but are unable to do so until there has been a [fol. 32] determination as to how the Federal Estate Tax on the residuary bequests should be prorated between those bequests.

WHEREFORE, the subscribers pray this Court to appoint a time and place for a hearing upon said computation and to make a determination of the proration of the Federal Estate Tax.

HARRY E. ROSS

and

THE SECOND NATIONAL BANK OF NEW HAVEN,

Executors

By /s/ F. B. Harris
Vice President

Subscribed and sworn to by F. B. Harris, as Vice-President of The Second National Bank of New Haven this 6th day of November, 1961, before me,

/s/ Sally L. Byrne
Notary Public.
My Commission expires April 1, 1965.

(seal)

[fol. 33]

Computation of Proposed Proration of Federal Estate Tax

(See opposite) ☞

Computation of Proposed Proration of Federal Estate Tax

(Note 1.—The basis of this computation is the Federal Estate Tax Return as filed except that a typographical error which occurred in totalling the items in Schedule J of the Return has been corrected. The correction of this total causes a change in the amount of the marital deduction, total deductions and the federal estate tax as shown in the return. The corrected totals for all of these items are used in this computation.)

	A. Allocation of Gross Estate	B. Allocation of Deductions per Exhibit 1 Attached	C. Allocation of Net Taxable Estate (Col. A minus Col. B)	D. Allocation of Total Federal Estate Tax Payable
I. Insurance None				
II. Widow's Allowance To Margaret F. Brewster	350,000.00	350,000.00	None	None
III. Jointly Owned Property Passing to Margaret F. Brewster, widow	123,872.76	123,872.76	None	None
IV. Transfers During Decedent's Life None				

[fol. 34]

	A. Allocation of Gross Estate	B. Allocation of Deductions per Exhibit 1 Attached	C. Allocation of Net Taxable Estate (Col. A minus Col. B)	D. Allocation of Total Federal Estate Tax Payable
V. POWERS OF APPOINTMENT None				
VI. SPECIFIC AND PARTICULAR DEVISES AND BEQUESTS NOT TAX-EXEMPT To Margaret F. Brewster, widow:				
Life Use of "Edgerton"	42,579.81	None	42,579.81	None
Life Use of paintings by Fuertes and of booklet of sketches by Fuertes	4,256.08	None	4,256.08	None
"Morelands"	138,000.00	138,000.00	None	None
26 Burns Street	16,000.00	16,000.00	None	None
80 Cliff Street	12,500.00	12,500.00	None	None
Personal Property	75,274.00	75,274.00	None	None
To Harry E. Ross	50,000.00	None	50,000.00	None
To Philip J. Rich	10,000.00	None	10,000.00	None
To Alvin F. Rich	10,000.00	None	10,000.00	None
To George M. Finnie	10,000.00	None	10,000.00	None
To John Churchill	10,000.00	None	10,000.00	None

[fol. 35]

	A. Allocation of Gross Estate	B. Allocation of Deductions per Exhibit 1 Attached	C. Allocation of Net Taxable Estate (Col. A minus Col. B)	D. Allocation of Total Federal Estate Tax Payable
To William Sutherland	10,000.00	None	10,000.00	None
To Hugh A. Young	10,000.00	None	10,000.00	None
To Bernard K. Barrett	10,000.00	None	10,000.00	None
To George Jones	10,000.00	None	10,000.00	None
To George S. Watrous	5,000.00	None	5,000.00	None
To Margaret Winter	4,000.00	None	4,000.00	None
To Beatrice Trower	1,000.00	None	1,000.00	None
To Clara Margaret Peterson	1,000.00	None	1,000.00	None
To Florence Lyon	1,000.00	None	1,000.00	None
To Tessie Mae Lintzner	1,000.00	None	1,000.00	None
To Mary Ellen Hughes	1,000.00	None	1,000.00	None
To Marie Walsh Barrett	1,000.00	None	1,000.00	None
To Charles J. Drazen	5,000.00	None	5,000.00	None
To Patrick Evers	400.00	None	400.00	None
To Edward C. Eyles	100.00	None	100.00	None

[fol. 36]

	A. Allocation of Gross Estate	B. Allocation of Deductions per Exhibit 1 Attached	C. Allocation of Net Taxable Estate (Col. A minus Col. B)	D. Allocation of Total Federal Estate Tax Payable
To Terence F. Gunn	200.00	None	200.00	None
To Richard Haran	5,000.00	None	5,000.00	None
To Olwin Kilpatrick	300.00	None	300.00	None
To Thomas McGoven	400.00	None	400.00	None
To John P. Murphy	200.00	None	200.00	None
To John L. Shanley	500.00	None	500.00	None
To Owen Walsh	5,000.00	None	5,000.00	None
To Edward A. Faulkner	5,000.00	None	5,000.00	None
To Herbert D. Johnstone	950.00	None	950.00	None
To Walter A. Johnstone	100.00	None	100.00	None
To Mary Helen Knowlton	5,000.00	None	5,000.00	None
To Reginald G. Mason	5,000.00	None	5,000.00	None
To Edwin J. Richards	400.00	None	400.00	None
To Richard J. Tucker	400.00	None	400.00	None

[fol. 37]

	A. Allocation of Gross Estate	B. Allocation of Deductions per Exhibit 1 Attached	C. Allocation of Net Taxable Estate (Col. A minus Col. B)	D. Allocation of Total Federal Estate Tax Payable
To Richard J. Dundas	800.00	None	800.00	None
To Lester Burr	2,950.00	None	2,950.00	None
To Benjamin F. Mitchell	1,550.00	None	1,550.00	None
To Cleora F. Rich	5,000.00	None	5,000.00	None
To Rufus P. Rood	1,850.00	None	1,850.00	None
To Reginald T. Bolt	5,000.00	None	5,000.00	None
To Mae Roberts	1,550.00	None	1,550.00	None
To Eileen Shirk	5,000.00	None	5,000.00	None
To Roger P. Tyler	20,000.00	None	20,000.00	None
Totals	511,259.89	241,774.00	269,485.89	None
VII. Tax-Exempt Specific and Particular Devises and Bequests				
To Cornell University: Remainder interest in paintings by Fuertes and in booklet of sketches by Fuertes	16,268.92	16,268.92	None	None
Cash	30,000.00	30,000.00	None	None

[fol. 38]

	A. Allocation of Gross Estate	B. Allocation of Deductions per Exhibit 1 Attached	C. Allocation of Net Taxable Estate (Col. A minus Col. B)	D. Allocation of Total Federal Estate Tax Payable
To City of New Haven: Remainder interest in "Edgerton"	147,827.21	147,827.21	None	None
Cash for demolition of "Edgerton"	70,000.00	70,000.00	None	None
Totals	264,096.13	264,096.13	None	None
VIII. RESIDUE				
To Margaret F. Brewster, widow	3,752,393.16	487,512.29	3,264,880.87	42,326.78
To trusts for grandchildren as follows:				
Barbara Brewster	833,865.14	108,336.06	725,529.08	421,135.96
Vallie Brewster	833,865.14	108,336.06	725,529.08	421,135.96
Priscilla Brewster	833,865.14	108,336.06	725,529.08	421,135.96
Susan Brewster	833,865.15	108,336.06	725,529.09	421,135.96
Pamela Brewster	833,865.15	108,336.06	725,529.09	421,135.96
Margaret Brewster Sewall	833,865.15	108,336.06	725,529.09	421,135.96
William Patrick Brewster	833,865.15	108,336.06	725,529.09	421,135.97

[fol. 39]

	A. Allocation of Gross Estate	B. Allocation of Deductions per Exhibit 1 Attached	C. Allocation of Net Taxable Estate (Col. A minus Col. B)	D. Allocation of Total Federal Estate Tax Payable
Geoffrey Brewster	833,865.15	108,336.06	725,529.09	421,135.97
Christopher Brewster Sewall	833,865.15	108,336.06	725,529.09	421,135.97
Totals	11,257,179.48	1,462,536.83	9,794,642.65	3,832,550.45

Total Gross Estate from Schedule O of Federal Estate Tax Return	$13,201,347.91
Total Deductions as in Schedule O of Federal Estate Tax Return (as corrected)	5,067,662.12
Net Estate plus specific exemption as in Schedule P of Federal Estate Tax Return (as corrected)	8,133,685.79
Total Federal Estate Tax Payable per computation in Federal Estate Tax Return (as corrected)	3,832,550.45

[fol. 40]

The Total of the Federal Estate Tax allocated against each Beneficiary is therefore as follows (Note 2):

Name	*Amount*
Margaret F. Brewster	$ 42,326.78
Trusts for grandchildren as follows:	
Barbara Brewster	421,135.96
Vallie Brewster	421,135.96
Priscilla Brewster	421,135.96
Susan Brewster	421,135.96
Pamela Brewster	421,135.96
Margaret Brewster Sewall	421,135.96
William Patrick Brewster	421,135.97
Geoffrey Brewster	421,135.97
Christopher Brewster Sewall	421,135.97
Total Federal Tax	$3,832,550.45

Note 2.—The executors have allocated the Federal Estate Tax on the pre-residuary bequests and devises to the residue generally. As a result, the amount of that tax, which has been ascertained by taking the proportion of the total Federal Estate Tax shown on the return as corrected which the amount of the taxable pre-residuary bequests and devises (that is, less those bequests which are charitable or are part of the marital deduction) bears to the total of all taxable bequests and devises, has been allocated one-third to the residuary bequest to the widow, Margaret F. Brewster, and two-twentyseventhes to each of the residuary trusts. On the other hand, the executors have allocated the full amount of the Federal Estate Tax on the residuary bequests to the residuary trusts on the basis of one-ninth of the amount of said tax to each trust.)

[fol. 41]

Exhibit 1

Allocation of Deductions

Part A

The deductions in Schedule O of the Federal return for funeral expenses, executors' commission, attorneys' fees, miscellaneous administration expenses, debts of the decedent and net losses total $617,278.77. These are allocated to residue.

Total $ 617,278.77

Part B

The deductions for charitable, public and similar bequests in Schedule O of the Federal return total $264,096.13. These are allocated to tax-exempt specific devises and bequests (Line VII)

Total 264,096.13

Part C

The deductions for mortgages and liens in Schedule O of the Federal Estate Tax return total—None

Total None

Part D

The marital deduction as in line 11 of Schedule O of the Federal Estate Tax return as corrected, is $4,186,287.22. This is [fol. 42] deductible from the following portions of the gross taxable estate:

Widow's allowance	$ 350,000.00
Jointly owned property	123,872.76
Specific and particular devises and bequests	241,774.00

Residue passing to spouse ($3,752,393.16 less $281,752.70, which is one-third of Connecticut Succession Tax and New Hampshire tax)	3,470,640.46	
Total		4,186,287.22

[fol. 43]

IN UNITED STATES DISTRICT COURT

EXHIBIT C, ANNEXED TO COMPLAINT

[EMBLEM]

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
REGIONAL COMMISSIONER
APPELLATE DIVISION – BOSTON REGION
1221 CHAPEL STREET
NEW HAVEN 11, CONNECTICUT

APR 6 1962

Connecticut
IN REPLY REFER TO
AP:BOS–NH:MK

CERTIFIED MAIL

Date of Death
September 16, 1958

Estate of Frederick F. Brewster
The Second National Bank of New Haven,
and Harry E. Ross, Co-executors
c/o The Second National Bank of New Haven
135 Church Street
New Haven, Connecticut

Gentlemen:

In accordance with the provisions of existing internal revenue laws, notice is given that the determination of

the estate tax liability for the above-named estate dis- [fol. 44] closes a deficiency in the amount of $1,333,194.35. The attached statement shows the computation of the deficiency.

IF YOU AGREE to this determination, please sign the enclosed agreement form and return it promptly to this office. An addressed envelope is enclosed for this purpose. The signing and filing of this agreement will permit an early assessment of the deficiency or deficiencies and will limit the accumulation of interest.

IF YOU DO NOT AGREE, and do not sign and return the enclosed form, the deficiency or deficiencies will be assessed for collection, as required by law, upon the expiration of ninety days from the date of this letter, unless within that time you contest this determination in the Tax Court of the United States by filing a petition with that Court in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C.

Very truly yours,

MORTIMER M. CAPLIN,
Commissioner

By

L. M. TIGH,
Associate Chief,
Appellate

Enclosures:

Statement

Agreement form 890-B

Addressed envelope

[fol. 45] AP:BOSNH:MK

STATEMENT

Estate of Frederick F. Brewster
The Second National Bank of New Haven,
and Harry E. Ross, Co-executors
c/o The Second National Bank of New Haven
135 Church Street
New Haven, Connecticut

Date of Death: September 16, 1958

ESTATE TAX

Liability	*Assessed*	*Deficiency*
$5,361,808.20	$4,028,613.85	$1,333,194.35

In making this determination of your estate tax liability, careful consideration has been given to the report of examination dated September 27, 1961, to your protest dated November 17, 1961, and to the statements made at the conferences held on February 8, 1962 and March 2, 1962.

It has been determined that the 3,500 shares of stock of United Illuminating Company held by the estate on September 16, 1959, had a value of $28⅛ per share on the alternate valuation date of September 16, 1959, or an aggregate value of $98,437.50.

It has been determined that marital deduction claimed by the taxpayer on account of the bequest of one-third [fol. 46] of the residuary trust for the benefit of the decedent's widow is limited to the amount of $1,682,846.59, and that the amount claimed as marital deduction in excess thereof is not allowable.

It has been determined that the bequest of $30,000.00 to be paid to Cornell University after the death of the decedent's wife is allowable as a charitable deduction in the amount of $23,150.70, which is the value of the be-

quest postponed until after the death of the decedent's wife.

It has been determined that the charitable bequests that are provided for in the will of funds to be used to demolish the main building on the property known as Edgerton and make necessary repairs to the Gate House on said property after the death of decedent's wife, when the said property will be given to the City of New Haven, Connecticut, for park purposes, are allowable as a charitable deduction in the aggregate amount of $23,158.42, which is the postponed value of the respective amounts required therefor of $24,500.00 and $5,510.00, payable after the death of decedent's wife.

A copy of this letter and statement has been mailed to your representative, Mr. Curtiss K. Thompson, c/o Thompson, Weir and Barclay, 205 Church Street, New Haven 10, Connecticut, in accordance with the authority contained in the power of attorney executed by you.

[fol. 47]

Schedule 1

(See opposite) ☞

Schedule 1

Adjustments to Taxable Estate

Taxable estate per return		$ 8,392,892.80
Additions to value of taxable estate and decreases in deductions:		
(a) Stocks and Bonds	$ 875.00	
(b) Other miscellaneous property	1,393.75	
(c) Bequests to surviving spouse	2,180,730.69	
(d) Charitable bequests	58,027.88	2,241,027.32
Total		$10,633,920.12
Deductions from value of taxable estate and increases in deductions:		
(e) Funeral and administrative expenses		478,810.50
Taxable estate as adjusted		$10,155,109.62

[fol. 48]

Schedule 1-A

Explanation of Adjustments

(a) Stocks and Bonds $875.00

	Return	Adjusted
Schedule B—Item 199(J)	$97,562.50	$98,437.50
Addition to value of estate	875.00	—
Total	$98,437.50	$98,437.50

See introductory paragraphs of this statement.

(b) Other miscellaneous property $1,393.75

	Return	Adjusted
Schedule F—Item 19 (added)	0	$ 654.21
Schedule F—Item 20 (added)	0	739.54
Addition to value of estate	1,393.75	
Total	$1,393.75	$1,393.75

It has been determined that an adjustment be made to include in the gross estate, refunds collected by the estate (Item 19), and refund of 1949 and 1950 income tax collected by the estate (Item 20).

(c) Bequests to surviving spouse $2,180,730.69

	Return	Adjusted
Schedule M—Item 6	$ 350,000.00	$ 116,666.67
Schedule M—Item 7	3,630,243.95	1,682,846.59
Addition to value of estate	—	2,180,730.69
Totals	$3,980,243.95	$3,980,243.95

See introductory paragraphs of this statement.

[fol. 49]

(d) Charitable bequests $58,027.88

	Return	Adjusted
Schedule N-12, Item 1(a)	$ 30,000.00	$ 23,150.70
Schedule N-12, Item 1(b)	16,268.92	15,838.94
Schedule N-12, Item 2(a)	147,827.21	143,920.19
Schedule N-12, Item 2(b)	70,000.00	23,158.42
Addition to value of estate	—	58,027.88
Totals	$264,096.13	$264,096.13

See introductory paragraphs of this statement.

(e) Funeral and administrative expenses $(478,810.50)

	Return	Adjusted
Schedule J-1, Item 71	$ 2,825.00	$ 3,102.07
Schedule total	45,535.76	524,069.19
Deduction from value of estate	478,810.50	—
Totals	$527,171.26	$527,171.26

It has been determined that Item 71 is to be allowed in the amount paid and to be paid as per evidence submitted. An adjustment has been made to the schedule total to correct a mathematical error on the return.

[fol. 50]

Schedule 2

Computation of Estate Tax

Taxable estate as adjusted, Schedule 1		$10,155,109.62
Gross estate tax:		
On $10,000,000.00	$6,088,200.00	
On $155,109.62 at 77%	119,434.41	$ 6,207,634.41
Credit for state death taxes substantiated		845,258.09
Balance		$ 5,362,376.32
Credit for foreign death taxes (same as return)		568.12
Estate tax liability		$ 5,361,808.20
Estate tax assessed, DT-3905		4,028,613.85
Deficiency in estate tax		$ 1,333,194.35
*Net deficiency provided additional credit for state death taxes of $255,959.45 is substantiated		$ 1,077,234.90

Upon receipt of a waiver or upon the expiration of ninety days from the date of this letter, if a petition is not filed with The Tax Court of the United States, the deficiency of $1,333,194.35 will be assessed. In the event that evidence of the payment of State, territorial estate, (Tr. 41) inheritance, legacy, or succession taxes, as required by Section 2011 of the Internal Revenue Code of 1954 is filed within the ninety-day period, the net deficiency in the amount of $1,077,234.90 will be assessed.

[fol. 51]

IN UNITED STATES DISTRICT COURT

MOTION FOR SUMMARY JUDGMENT UNDER RULE 56—
Filed October 4, 1962

Now comes the plaintiff in the above entitled action and moves for summary judgment on the issue of liability, and in support of such motion respectfully represents:

1. The amount of damages which the plaintiff is entitled to recover in this action, if any, turns upon the resolution of two issues of law, viz:

(a) Whether the widow's allowance granted to the decedent's surviving spouse by the Probate Court and paid by the executors was a property interest that passed from decedent to such spouse within the meaning of Section 2056 of the Internal Revenue Code of 1954.

(b) Whether the property passing to the surviving spouse of the decedent under Part I of Article Nine of the will, as amended by the codicil, should be reduced in value by any part of the federal estate tax attributable to the residuary estate.

2. The amount of damages recoverable by the plaintiff will vary depending upon the judgment rendered on the aforesaid issues and, therefore, cannot be proven or computed until after such issues are adjudicated.

3. As appears from the pleadings herein and the affidavit of Charles E. Arntsen, verified October 2, 1962, and [fol. 52] filed in support of this motion, there is no genuine issue herein as to any fact material to the plaintiff's cause of action, excepting the amount of damages.

4. The plaintiff is entitled to judgment as a matter of law.

Wherefore, the plaintiff moves pursuant to Rule 56 that a summary judgment be entered in favor of the plaintiff on each of the issues affecting the liability of the defendant.

Dated at New Haven, this 4th day of October, 1962.

Curtiss K. Thompson, of Thompson, Weir & Barclay, 205 Church Street, New Haven, Connecticut.

Certification

This certifies that three true copies of the foregoing Motion for Summary Judgment Under Rule 56 and of the Affidavit of Charles E. Arnsten in Support of Plaintiff's Motion for Summary Judgment were delivered on October 4, 1962 to the United States Attorney, Federal Building, New Haven, Connecticut, attorney for the defendant.

John H. Weir, of Thompson, Weir & Barclay, 205 Church Street, New Haven, Connecticut, Attorneys for Plaintiff.

[fol. 53]

AFFIDAVIT OF CHARLES E. ARNTSEN IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

State of Connecticut,
County of New Haven—ss.:

Charles E. Arntsen being duly sworn, deposes and says that he resides at 999 Forest Road in the City of New Haven, County of New Haven and State of Connecticut and that he is and for many years past has been a Trust Officer of The Second National Bank of New Haven, the plaintiff in the above entitled action.

Deponent further says that as a Trust Officer of said bank he has actively participated in the settlement of the Estate of Frederick F. Brewster, late of Hamden, Connecticut, deceased, since his death on September 16, 1958;

that he is familiar with the complaint in this action and knows the contents and allegations thereof, that he is likewise familiar with the Motion for Summary Judgment to be filed herein by the plaintiff and that he makes this affidavit in support of such motion.

Relevant facts are stated in paragraphs below numbered to correspond with the paragraphs of the complaint to which they pertain. Inasmuch as the complaint has annexed to it Exhibits designated, A, B, C, D, E, F and G, the Exhibits annexed to this affidavit are designated H, I, J, K, L, M, N and O.

1. The plaintiff is seeking the recovery of federal estate taxes and interest thereon in a sum exceeding [fol. 54] $1,600,000. which it paid to the District Director of Internal Revenue for the Estate of Frederick F. Brewster, deceased. The dates and amounts of payments made by the plaintiff are as follows:

December 16, 1959	$4,028,613.85	taxes
May 29, 1962	1,333,194.35	taxes
May 29, 1962	195,285.58	interest

2. The Second National Bank of New Haven is a corporation organized and existing under the national banking laws and is located in the City of New Haven in the State of Connecticut and is the executor of the last will and codicil thereto of Frederick F. Brewster, late of Hamden, Connecticut, deceased. This action is brought by said bank in its capacity as such executor. Annexed hereto and marked Exhibit H is a certificate of the Probate Court for the District of Hamden evidencing the appointment of said bank as such executor.

3. Said Frederick F. Brewster at the time of his death on September 16, 1958 was a citizen of the United States and resided at No. 840 Whitney Avenue, Hamden, Connecticut. Exhibit A annexed to the complaint is a true copy of the last will and codicil of said decedent. An-

nexed hereto and marked Exhibit I is a copy of the resignation of Harry E. Ross as executor and of the order of the Probate Court dated May 7, 1962 accepting the same, and certified by said Probate Court.

4. Annexed hereto and marked Exhibit J and certified by the Clerk of said Probate Court is a true copy of the [fol. 55] application of the executors dated February 2, 1959 for an allowance for the support of decedent's widow during the settlement of the estate and of certain proceedings thereon including the order of the Probate Court making such an allowance. In compliance with such order, the executors of the estate of said decedent on March 13, 1959 paid the amount of said allowance, i.e. $350,000. to said Margaret F. Brewster.

5. A federal estate tax return for the estate of said decedent was filed by the executors with the District Director of Internal Revenue in Hartford, Connecticut on December 16, 1958. As appears in paragraph 1 above, the executors then paid the District Director the amount of tax shown by said return to be due. Annexed hereto and marked Exhibit K is a true copy of such parts of said return as are believed to be material to the issues here, consisting of the Computation of Tax and Schedules M, N, O, P and S.

6. Annexed hereto and marked Exhibit L is a true copy of the letter from said District Director of Internal Revenue to the executors dated October 18, 1961 and of the accompanying report on his examination of said federal estate tax return. Also annexed hereto and marked Exhibit M is a true copy of the protest filed by the executors and their attorneys against certain of the adjustments in federal estate tax liability proposed by the District Director. Thereafter the attorneys for the executors and, on one occasion, the deponent attended conferences or hearings before representatives of the Internal Revenue [fol. 56] Service and opposed the assessment of any deficiency in federal estate taxes.

7, 8 and 9. Annexed hereto and marked Exhibit N and certified by the Clerk of said Probate Court is a true copy of an application made by the executors on November 10, 1961 to said Probate Court pursuant to Chapter 218 of the General Statutes of Connecticut, Revision of 1958 for a determination as to how the federal estate tax on the residuary bequests should be prorated between such bequests and accompanying computation and of proceedings in said Probate Court with respect thereto. Exhibit B annexed to the complaint is also a true copy of the aforesaid application and computation.

10. Exhibit C annexed to the complaint is a true copy of the letter of the Commissioner of Internal Revenue dated April 6, 1962 and statement accompanying it which was mailed to and received by the executors.

12. Exhibit D annexed to the complaint is a true copy of a written instrument on Treasury Department Form 890-B, which the plaintiff executed on May 12, 1962 and thereupon delivered to the District Director of Internal Revenue.

13. Annexed hereto and marked Exhibit O is a true copy of a notice on Form 17A of the Treasury Department of additional federal estate taxes in the amount of $1,333,194.35 and interest of $195,285.58 assessed against the estate of said decedent on May 16, 1962 and demand [fol. 57] for the payment thereof which was sent by said District Director of Internal Revenue to the plaintiff. Exhibit E annexed to the complaint is a true copy of the letter of the attorneys for the plaintiff transmitting a check in payment of said sums and of the receipt therefor of the District Director of Internal Revenue.

15. Exhibit F annexed to the complaint is a true copy of the claim for refund which was filed by the plaintiff with the District Director of Internal Revenue on or about June 7, 1962.

16. Exhibit G annexed to the complaint is a true copy of a letter of the Commissioner of Internal Revenue dated August 14, 1962 and report attached thereto which he sent to the plaintiff.

18. The defendant has not paid to the plaintiff or the estate of the decedent the whole or any part of the monies which it received as aforesaid.

Charles E. Arntsen, Trust Officer

Subscribed and sworn to this 2nd day of October, 1962, before me,

John H. Weir, Notary Public, My Commission expires April 1, 1966.

(seal)

[fol. 58]

EXHIBIT K, ANNEXED TO AFFIDAVIT OF CHARLES E. ARNTSEN

Parts of federal estate tax return.

[*For convenience of Court and Counsel this Exhibit is bound in on the opposite page*]

Federal Tax Unit

FORM 706
(Rev. Dec. 1955)
U. S. TREASURY DEPARTMENT
Internal Revenue Service

UNITED STATES ESTATE TAX RETURN

(Applicable only to estates of decedents dying on or after August 17, 1954. If decedent died prior to August 17, 1954, use Form 706, Revised December 1953.)

Estates of nonresidents not citizens of the United States may generally file on Form 706NA instead of this form. For details see page 39.

DO NOT WRITE IN SPACE BELOW
Date received

Decedent's name	Date of death
FREDERICK F. BREWSTER	September 16, 1958
Residence (domicile) at time of death	**Citizenship (nationality) at time of death**
840 Whitney Avenue, Hamden, Connecticut	U.S.A.

COMPUTATION OF TAX

(See instructions on page 38)

PART I

1. Gross estate tax (use table A, page 40)		$4,866,798.53
2. Credit for State death taxes (use Table B, page 40)		837,616.56
3. Gross estate tax less credit for State death taxes (item 1 minus item 2). This is the net amount payable unless credit for Federal gift taxes, tax on prior transfers, or foreign death taxes is claimed in Part II		$4,029,181.97

PART II

4. Credit for Federal gift taxes	$ None	
5. Credit for tax on prior transfers	None	
6. Credit for foreign death taxes	568.12	568.12
7. Total of credits under Part II (total of items 4, 5, and 6)		
8. Net estate tax payable (item 3 minus item 7)		$4,028,613.85

(SPACE FOR USE OF INTERNAL REVENUE SERVICE)

Tax on return or deficiency	Assessments				Payments		
	Amount	List	Page	Line	Date	Principal	Interest
	$					$	$

DETERMINATION BY INTERNAL REVENUE SERVICE

[fol. 59]

GENERAL INFORMATION

1. Address of decedent at time of death (Number, street, city, zone, and State)

840 Whitney Avenue, Hamden, Connecticut

2a. State in which domiciled at time of death	2b. Year in which this domicile was established	
Connecticut	1910	
3. Date of marriage to surviving spouse	**4. Domicile at date of marriage to surviving spouse**	**5. Citizenship (nationality) at date of death**
June 11, 1903	New Haven, Connecticut	U.S.A.
6a. Place of death	**6b. Cause of death**	**6c. Length of last illness**
New Haven	Carcinoma of lung	6 months

7. Decedent's physicians

NAMES	ADDRESSES (Number, street, city, zone, and State)
Hugh L. Dwyer, M.D.	309 Edwards Street, New Haven, Connecticut

8. If decedent was confined in a hospital during his last illness or within 3 years prior to his death, give name and address of hospital

Grace-New Haven Hospital
New Haven, Connecticut

9a. Date of birth	9b. Place of birth (City and State or country, if other than United States)	
August 13, 1872	Irvington, New York	
10a. Business or occupation	**10b. If retired, state former business or occupation**	
Own business - Investments	None	

10c. Business address (Number, street, city, zone, and State)

129 Church Street, New Haven, Connecticut

11. Marital status at date of death

☒ Married ☐ Single ☐ Separated ☐ Widowed ☐ Divorced

12a. If widowed, give name of deceased spouse	12b. Date of death	13. Number of children
----	----	Four

14. Heirs, next of kin, devisees, and legatees (If more than five, only the names of the five principal ones are required)

NAME	RELATIONSHIP	ADDRESS (Number, street, city, zone, and State)
Margaret F. Brewster	Wife	840 Whitney Avenue, Hamden, Connecticut
John Brewster	Son	Devon, Pennsylvania
Elmina B. Sewall	Daughter	Brown Street, Kennebunk, Maine
Frederick Brewster	Son	1220 Pioneer Building, St. Paul, Minnesota
William Brewster	Son	Al Harvey Road, Stonington, Connecticut

[fol. 60]

15. Did the decedent die testate?	16a. Were letters testamentary or of administration granted for this estate?	16b. Date granted
☒ Yes ☐ No	☒ Yes ☐ No	Oct. 6, 1958
16c. Case No.	**16d. Name of court**	**16e. Location of court**
	Probate Court District of Hamden	Hamden, Connecticut

16f. To whom granted? (Designate whether executor, executrix, administrator, or administratrix. Explain if different from the person or persons filing return)

NAME	DESIGNATION	ADDRESS (Number, street, city, zone, and State)
The Second National Bank of New Haven	Co-Executor	135 Church Street, New Haven, Connecticut
Harry E. Ross	Co-Executor	129 Church Street, New Haven, Connecticut

GENERAL INFORMATION—Continued

17a. Did the decedent at date of death own property in any State or country other than that of his last domicile? ☒ Yes ☐ No
If "Yes," state place of ancillary probate proceedings

Dublin, New Hampshire (Keene)

17b. Name of ancillary administrator or executor

Harry E. Reed

17c. Address of ancillary administrator or executor (Number, street, city, zone, and State)

129 Church Street, New Haven, Connecticut

18a. Did the decedent at the time of his death have a safe deposit box held either alone or in the joint names of himself and another? ☒ Yes ☐ No
If "Yes," state location

The Second National Bank of New Haven

18b. If held jointly, give the name of the joint depositor

None

18c. Relationship of joint depositor to decedent

None

18d. If the decedent had a safe deposit box at the time of his death, indicate under what schedules in this return the contents are listed

Schedule B

18e. If any of the contents of the safe deposit box are omitted from the schedules, explain why

Not omitted

19. Did the undersigned person or persons filing return make diligent and careful search for property of every kind left by the decedent? ☒ Yes ☐ No

20. Did the same undersigned make diligent and careful search for information as to any transfers of the value of $5,000 or more made by the decedent during his lifetime without an adequate and full consideration in money or money's worth? ☒ Yes ☐ No

21. Did the same undersigned make diligent and careful search for the existence of any trusts created by the decedent during his lifetime or any trusts created by other persons under which the decedent possessed any power, beneficial interest, or trusteeship? ☒ Yes ☐ No

22a. Name of attorney representing estate, if any

Curtiss K. Thompson

22b. Address (Number, street, city, zone, and State)	22c. Telephone No.
205 Church Street, New Haven, Connecticut	LOcust 2-6101

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ALTERNATE VALUATION

(These instructions apply only if alternate valuation is elected. For further information on this subject, see General Instructions on page 4)

23. An election to have the gross estate of the decedent valued as of the alternate date or dates is made by entering a check mark in the box set forth below.

☒ The executor elects to have the gross estate of this decedent valued in accordance with values as of a date or dates subsequent to the decedent's death as authorized by section 2032 of the Code.

The election cannot be exercised unless it is shown upon the return, Form 706, and the return is filed within 15 months after the decedent's death or within the period for filing the return as extended by the District Director.

The due date for the filing of the return is the day of the 15th calendar month after the decedent's death numerically corresponding to the day of the calendar month in which death occurred, except that, if there is no numerically corresponding day in such 15th month, the last day of such 15th month is the due date. For example, if the decedent died on August 31, 1954, the due date is November 30, 1955. If placed in the mails the return must be posted in ample time to reach the District Director's office, under ordinary handling of the mails, on or before the date on which the return is required to be filed.

SCHEDULE M

BEQUESTS, ETC., TO SURVIVING SPOUSE (MARITAL DEDUCTION)

If the decedent died testate, the person or persons filing the return should answer the following questions. Only question 4 should be answered in case the decedent died intestate. If the answer to any question is "Yes," full details should be submitted with the return.

1. Has any action been instituted to contest the will or any provision thereof affecting any property interest listed on this schedule or for construction of the will or any such provision? ☐ Yes ☒ No

2a. Had the surviving spouse the right to declare an election between (i) the provisions made in his or her favor by the will and (ii) dower, curtesy, or a statutory interest? ☒ Yes ☐ No

2b. If answer to question 2a is "Yes," has the surviving spouse renounced the will and elected to take dower, curtesy, or a statutory interest? ☐ Yes ☐ No

2c. Elected to take under the will. ☒ Yes ☐ No By Inaction

2d. Does the surviving spouse contemplate renouncing the will and electing to take dower, curtesy, or a statutory interest? ☐ Yes ☒ No

3. According to the information and belief of the person or persons filing the return, is any action described under question 1 designed or contemplated? ☐ Yes ☒ No

4. According to the information and belief of such person or persons, has any person other than the surviving spouse asserted (or is any such assertion contemplated) a right to any property interest listed on this schedule, other than as indicated under questions 1 or 3? ☐ Yes ☒ No

Item No.	Description of property interests passing to surviving spouse	Value
1	**See Schedule M hereto annexed**	$

TOTAL	None	$ 4,627,643.41
Less: (a) Federal estate tax payable out of above-listed property interests	$ 281,752.70	
(b) Other death taxes payable out of above-listed property interests		
Total of items (a) and (b)		281,752.70
Net value of above-listed property interests (also enter under the Recapitulation, Schedule O)		$ 4,345,890.71

(If more space is needed, insert additional sheets of same size)

ESTATE OF _____ Schedule M—Page 39.

[fol. 62]

SCHEDULE M

tem

1	Real property known as "Morelands" located in Dublin, New Hampshire being Item 1 Schedule A (Under Article Three of the will)			138,000.0
2	Real property known as #26 Burns Street, New Haven, Connecticut being Item 3 Schedule A (Under Article Three of the will)			16,000.0
3	Real property known as #30 Cliff Street, New Haven, Connecticut being Item 2 Schedule A (Under Article Three of the will)			12,500.0
	Tangible personal property (except Bird paintings, Booklet, and tools and equipment at "Brookfield Farm" (under Article Four of the will)			75,274.0
	Jointly owned property reported in Schedule E			123,872.76
	Widows allowance as ordered by Probate Court			350,000.00
	One-third of the residue (Article Nine, Part 1) calculated as follows:			
	The following items constituting the "Probate Estate:"			
	Real Estate as shown in Schedule A		543,200.00	
	Stocks and Bonds as shown in Schedule B		12,218,274.69	
	Mortgages, Notes and Cash as shown in Schedule C		219,651.46	
	Miscellaneous Property as shown in Schedule F		96,349.00	
			$13,077,475.15	
	less the following:			
	Real property known as "Edgerton" (Article Two)-Item 4 Schedule A	186,500.00		
	Bird Paintings and "Booklet" (Article Two)-Items 17 and 18 Schedule F	20,525.00		
	Pecuniary Bequests (Article Two)	100,000.00		
	Amounts carried forward	$307,025.00	$13,077,475.15	$715,646.76

[fol. 63]

Amounts brought forward	$307,025.00	$13,077,475.15	$725,646.76
Real property known as "Morelands" (Article Three) Item 1 Schedule A	138,000.00		
Real property known as #26 Burns Street (Article Three) Item 3 Schedule A	16,000.00		
Real property known as #80 Cliff Street, (Article Three) Item 2 Schedule A	12,500.00		
Tangible Personal Property to Mrs. Brewster (Article Four) Item 4 above	75,274.00		
Pecuniary Bequests (Articles Five, Six and Seven)	222,650.00		
Widows allowance as ordered by Probate Court	350,000.00		
Administration expenses claimed on 706 (being Items 1 through 71 Schedule J)	45,535.76		
Administration expenses not claimed on Form 706 (reported for information purposes as Items 72 through 98, Schedule J)	77,434.85		
Debts of decedent claimed on Form 706 (being Items 1 through 54 Schedule K)	92,932.51		
Debts of decedent not claimed on Form 706 (reported for information purposes as Items 55 through 58 Schedule K)	4,133.06	1,341,485.18	
		11,735,989.97	
Residue			
1/3 of which is			3,911,996.65
			$4,627,643.41

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SCHEDULE N

CHARITABLE, PUBLIC, AND SIMILAR GIFTS AND BEQUESTS

Item No.	Name and address of beneficiary	Character of institution	Amount
1	Cornell University	Educational	$
	a) Pecuniary bequest		30,000.00
	b) Remainder interest in bird paintings and "Bachlet" (being Items 17 and 18 in Schedule F) upon death of Mrs. Executor (born July 24, 1907.)		16,268.92
2	City of New Haven	Public	
	a) Remainder interest in Edgerton upon Mrs. Executor's death		147,827.21
	b) Pecuniary bequest		70,000.00
	TOTAL (also enter under the Recapitulation, Schedule O)		$ 264,096.13

(If more space is needed, insert additional sheets of same size)

ESTATE OF ..... Frederick P. Excutor .....

Schedule N—Page 31

[fol. 65]

SCHEDULE O
RECAPITULATION

Schedule	Gross estate	Alternate value	Value at date of death
A	Real estate	$543,200.00	$525,875.00
B	Stocks and bonds	12,218,274.69	12,127,019.57
C	Mortgages, notes, and cash	219,651.46	219,651.46
D	Insurance	None	None
E	Jointly owned property	123,872.76	123,872.76
F	Other miscellaneous property	96,349.00	96,649.00
G	Transfers during decedent's life	None	None
H	Powers of appointment	None	None
I	Annuities	None	None
	TOTAL GROSS ESTATE	$ 13,201,347.91	$ 13,093,067.79

Schedule	Deductions	Amount	
J	1. Funeral expenses and expenses incurred in administering property subject to claims	$ 45,535.76	
K	2. Debts of decedent	92,932.51	
K	3. Mortgages and liens	None	
	4. Total of items 1 through 3	$ ~~138,468.27~~	
	5. Allowable amount of deductions from item 4 (see note*)	$ 138,468.27	
L	6. Net losses during administration	None	
L	7. Expenses incurred in administering property not subject to claims	None	
	8. Total of items 5 through 7		$ 138,468.27
M	9. Bequests, etc., to surviving spouse	$ 4,345,890.71	
	10. Adjusted gross estate (see note**)	13,062,879.64	
	11. Net amount deductible for bequests, etc., to surviving spouse (item 9 or one-half of item 10, whichever is smaller)		4,345,890.71
N	12. Charitable, public, and similar gifts and bequests		264,096.13
	TOTAL ALLOWABLE DEDUCTIONS, except specific exemption (totals of lines 8, 11, and 12)		$ 4,748,455.11

*Note.—See paragraph 1 of the instructions.

**Note.—Enter at item 10 the excess of "TOTAL GROSS ESTATE" over item 8, if the decedent and his surviving spouse at no time held property as community property. If property was ever held as community property, compute the "Adjusted gross estate" (item 10) in accordance with the instructions and example on page 32, and attach an additional sheet showing such computation.

ESTATE OF Frederick F. Brewster

Schedule O—Page 33.

88—16—71698-1

[fol. 65a]

SCHEDULE P

TAXABLE ESTATE—RESIDENT OR CITIZEN

Instructions.—This Schedule Should Be Used only for the Estate of a Resident or Citizen of the United States

1. Total gross estate		$13,201,347.91
2. Total allowable deductions	$4,748,455.11	
3. Specific exemption	60,000.00	4,808,455.11
4. Total deductions plus specific exemption		
5. Taxable estate (item 1 minus item 4)		$ 8,392,892.80

SCHEDULE Q

TAXABLE ESTATE—NONRESIDENT NOT A CITIZEN OF THE UNITED STATES

Instructions.—This schedule should be used only for the estate of a nonresident not a citizen of the United States. See instructions under "Deduction of administration expenses, claims, etc." on page 39. See also instructions under "Specific exemption" on page 39 for amount of specific exemption and names of countries, the estates of whose residents qualify for the "prorated specific exemption." Use Form 706g (Schedule Q (2)) instead of Schedule Q in case of decedent who at the time of his death was domiciled in France or Greece and was not a citizen of the United States. (If the "prorated specific exemption" is claimed under the Japanese convention, the numerator of the fraction set forth in item 7 is the value of the property situated in the United States and subjected to tax by both Japan and the United States.)

1. Value of gross estate in the United States (Schedules A, B, C, D, E, F, G, H, and I)	$
2. Value of gross estate outside the United States, not including real property (must be supported by proof described in instructions under "Deduction of administration expenses, claims, etc., on page 39)	
3. Value of total gross estate wherever situated (item 1 plus item 2)	$
4. Gross deductions under Schedules J, K, and L	$
5. Net deductions under Schedules J, K, and L (that proportion of item 4 that item 1 bears to item 3)	$
6. Charitable, public, and similar gifts and bequests (Schedule N)	
7. Specific exemption of $2,000 (in estates qualifying for "prorated specific exemption," use $2,000 or $\frac{\text{item 1}}{\text{item 3}} \times \$60{,}000$, whichever is the greater)	
8. Total deductions plus specific exemption (item 5 plus items 6 and 7)	$
9. Taxable estate (item 1 minus item 8)	$ None

SCHEDULE R

CREDIT FOR TAX ON PRIOR TRANSFERS

Name of transferor	Date of transferor's death
Transferor's residence at time of death	

COMPUTATION OF THE CREDIT

PART I—TRANSFEROR'S TAX ON PRIOR TRANSFERS	
1. Net value of transfers	$
2. Value of transferor's estate (adjusted in accordance with instructions for item 2)	$
3. Tax on transferor's estate (adjusted in accordance with instructions for item 3)	$
4. Transferor's tax on prior transfers (proportion of item 3 which item 1 bears to item 2)	$
PART II—TRANSFEREE'S TAX ON PRIOR TRANSFERS	
5. Transferee's tax computed without regard to credit allowed under this schedule	$
6. Transferee's reduced gross estate	$
7. Transferee's deductions (adjusted in accordance with instructions for item 7)	
8. Transferee's reduced taxable estate (item 6 minus item 7)	$
9. Tax on reduced taxable estate	
10. Transferee's tax on prior transfers (item 5 minus item 9)	$
PART III—CREDIT ALLOWABLE	
11. Maximum amount before application of percentage requirement (item 4 or item 10, whichever is smaller)	$
12. Percent allowable is	
13. Credit allowable (item 12 × item 11)	$ None

INSTRUCTIONS FOR SCHEDULE S—Continued

daughter's inheritance is $65,000, consisting entirely of stocks of M country corporations. The amount of the M country inheritance tax imposed on the daughter's inheritance is $19,500. M country did not impose inheritance tax on the bonds issued by the M country corporations.

Schedule S is filled out as follows:

1. Amount of estate, inheritance, legacy and succession taxes imposed in the above country attributable to property situated in that country, and subjected to such taxes, and included in the gross estate (as defined by statute)	$22,500.00
2. Value of the gross estate (adjusted)	$200,000.00
3. Value of property situated in that country, and subjected to death taxes imposed in that country, and included in the gross estate (adjusted)	$65,000.00
4. Federal estate tax before allowance of credit for foreign death taxes	$25,820.00
5. Amount of Federal estate tax attributable to property specified at item 3 (proportion of item 4 that item 3 bears to item 2)	$8,301.50
6. Credit for death taxes imposed in the above country (item 1 or item 5, whichever is the smaller)	$8,301.50

The additional sheet showing the computation of the amount of inheritance taxes entered at item 1 sets forth as follows:

Computation of portion of M country inheritance tax imposed upon the widow's inheritance attributable to property subjected to Federal estate tax (instructions for item 1 of Schedule S)—

1. Amount of M country inheritance tax imposed on the inheritance	$21,000.00
2. Value of property situated in M country, subjected to M country inheritance tax and included in the gross estate	$10,000.00
3. Total value of property subjected to M country inheritance tax	$70,000.00
4. Amount of M country inheritance tax attributable to item 2 (proportion of item 1 that item 2 bears to item 3)	$3,000.00

Total M country inheritance tax attributable to property situated in that country and included in the gross estate—

1. For widow's inheritance	$3,000.00
2. For daughter's inheritance	$19,500.00
3. Total	$22,500.00

SCHEDULE S

CREDIT FOR FOREIGN DEATH TAXES

List all of the foreign countries to which death taxes have been paid, credit for the payment of which is claimed on this return .....

If credit is claimed for death taxes paid to more than one foreign country, compute the credit for taxes paid to one country on this sheet and use a separate copy of Schedule S for each of the other countries. The copies of Schedule S on which the additional computations are made should be attached hereto.

The credit computed on this sheet is for Succession Duty Taxes
(Name of death tax or taxes)

..... imposed in Dominion of Canada
(Name of country)

Credit is computed under the Treaty
(Insert "treaty" or "statute")

COMPUTATION OF THE CREDIT

(All amounts and values shown hereunder must be entered in United States money)

1. Amount of estate, inheritance, legacy and succession taxes imposed in the above country attributable to property situated in that country, and subjected to such taxes, and included in the gross estate (as defined by statute)	$ 568.12
2. Value of the gross estate (adjusted, if necessary, in accordance with instructions for item 2)	8,591,361.07
3. Value of property situated in that country, and subjected to death taxes imposed in that country, and included in the gross estate (adjusted, if necessary, in accordance with instructions for item 3) (Alternate Value)	$ 15,750.00
4. Federal estate tax before allowance of credit for foreign death taxes	4,029,181.97
5. Amount of Federal estate tax attributable to property specified at item 3 (proportion of item 4 that item 3 bears to item 2)	$ 7,385.49
6. Credit for death taxes imposed in the above country (item 1 or item 5, whichever is the smaller)	$ 568.12

ESTATE OF Frederick F. Brewster

[fol. 65c]

DECLARATION

We/I declare under the penalties of perjury that this return (including any accompanying statements) has been examined by us/me, and is, to the best of our/my knowledge and belief, a true, correct, and complete return, made in good faith pursuant to the Internal Revenue Code and the regulations thereunder.

Dec 15 1959 (Date)	Harry E Brewster (Signature)	AND	129 Church Street New Haven, Connecticut (Address)
Dec 15 1959	THE [illegible] NATIONAL BANK OF NEW HAVEN, CO-EXECUTOR By F B Stevens Vice President		135 Church Street New Haven, Connecticut

DECLARATION OF ATTORNEY OR AGENT PREPARING RETURN

I declare under the penalties of perjury that I prepared this return for the person or persons named herein; and that this return (including any accompanying schedules and statements) is, to the best of my knowledge and belief, a true, correct, and complete return based on all the information relating to the matters required to be reported in this return of which I have any knowledge.

(Date)	(Signature)	(Address)

TABLE A

COMPUTATION OF GROSS ESTATE TAX

Taxable estate equaling (1)	Taxable estate not exceeding (2)	Tax on amount in column (1) (3)	Rate of tax on excess over amount in column (1) (4)
(Dollars)	(Dollars)	(Dollars)	(Percent)
----------	5,000	----------	3
5,000	10,000	150	7
10,000	20,000	500	11
20,000	30,000	1,600	14
30,000	40,000	3,000	18
40,000	50,000	4,800	22
50,000	60,000	7,000	25
60,000	100,000	9,500	28
100,000	250,000	20,700	30
250,000	500,000	65,700	32
500,000	750,000	145,700	35
750,000	1,000,000	233,200	37
1,000,000	1,250,000	325,700	39
1,250,000	1,500,000	423,200	42
1,500,000	2,000,000	528,200	45
2,000,000	2,500,000	753,200	49
2,500,000	3,000,000	998,200	53
3,000,000	3,500,000	1,263,200	56
3,500,000	4,000,000	1,543,200	59
4,000,000	5,000,000	1,838,200	63
5,000,000	6,000,000	2,468,200	67
6,000,000	7,000,000	3,138,200	70
7,000,000	8,000,000	3,838,200	73
8,000,000	10,000,000	4,568,200	76
10,000,000	----------	6,088,200	77

TABLE B

COMPUTATION OF MAXIMUM CREDIT FOR STATE DEATH TAXES

Taxable estate equaling (1)	Taxable estate not exceeding (2)	Credit on amount in column (1) (3)	Rate of credit on excess over amount in column (1) (4)
(Dollars)	(Dollars)	(Dollars)	(Percent)
40,000	90,000	----------	0.8
90,000	140,000	400	1.6
140,000	240,000	1,200	2.4
240,000	440,000	3,600	3.2
440,000	640,000	10,000	4.0
640,000	840,000	18,000	4.8
840,000	1,040,000	27,600	5.6
1,040,000	1,540,000	38,800	6.4
1,540,000	2,040,000	70,800	7.2
2,040,000	2,540,000	106,800	8.0
2,540,000	3,040,000	146,800	8.8
3,040,000	3,540,000	190,800	9.6
3,540,000	4,040,000	238,800	10.4
4,040,000	5,040,000	290,800	11.2
5,040,000	6,040,000	402,800	12.0
6,040,000	7,040,000	522,800	12.8
7,040,000	8,040,000	650,800	13.6
8,040,000	9,040,000	786,800	14.4
9,040,000	10,040,000	930,800	15.2
10,040,000	----------	1,082,800	16.0

[fol. 65d]

ESTATE OF Frederick F. Brewster

U. S. GOVERNMENT PRINTING OFFICE 1960—16—71688-1

[fol. 66]

Exhibit L, Annexed to Affidavit of Charles E. Arntsen

Letter from District Director of Internal Revenue to the executors and accompanying report.

[*For convenience of Court and Counsel this Exhibit is bound in on the opposite page*]

COPY

U.S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
460 CAPITOL AVENUE
HARTFORD, CONNECTICUT

P. O. Box 2158

IN REPLY REFER TO
A:R:30D

OCT 18 1961

Estate of Frederick F. Brewster
Date of Death: 9-16-58

The Second National Bank of New Haven, Co-Exec. et al.
Estate of Frederick F. Brewster
135 Church Street
New Haven, Connecticut

Gentlemen:

The attached report, which has been carefully reviewed by this office, discloses certain adjustments or conclusions resulting from the examination of the ~~return(s) for the taxable year(s) indicated hereinx~~ estate tax return.

If you accept the findings, please execute the enclosed agreement form and return it to this office promptly. If you do not accept the findings, you may, WITHIN 30 DAYS from the date of this letter, file a protest in accordance with the enclosed instructions. Any protest filed will be given careful consideration and, if requested, a conference will be granted by the Appellate Division of the Regional Commissioner's office.

Submission of the agreement form will expedite assessment of the proposed deficiency and stop the running of interest thereon 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earliest. If desired, payment of the proposed deficiency may be made without awaiting assessment by making remittance therefor payable to the INTERNAL REVENUE SERVICE, at the address shown above, enclosing this letter or a copy thereof. The remittance should include interest on the additional tax (exclusive of penalties, if any) computed at 6% per annum from the due date of the return to the date of the payment.

This is not a statutory notice of deficiency. If, however, upon the expiration of the 30-day period you have not submitted the agreement form, or a written protest, or you have not advised that the deficiency has been paid or will be paid upon notice and demand, a statutory notice will then be sent as provided by law.

Prompt execution and return of the enclosed receipt form indicating your position with respect to the findings disclosed by the report will be greatly appreciated.

IMPORTANT: It is essential that communications transmitting protests or agreements relative to this case be addressed to the District Director of Internal Revenue, Audit Division, at the above address. Please cite the reference shown at the top right of this letter.

Very truly yours,

Donald J. Conley

District Director of Internal Revenue

Enclosures:
Report of Examination
Agreement Form 890-B
Receipt Form (Form 1291)
Instructions IRS Pub. 115
Form
Copy sent to Curtiss K. Thompson, Esq. et al
205 Church Street
New Haven, Connecticut

Mr. Thomas Murphy
Extension 51

[fol. 67]

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PART II

Estate of: Frederick P. Brewster

Date of death: September 16, 1958

PRELIMINARY STATEMENT

STATEMENT OF TAX LIABILITY

	Tax Previously Assessed	Adjustments in this report		Correct Tax Liability
		Deficiency	Overassessment	
Estate Tax	4,028,613.65	1,336,468.40		5,365,082.25

The deficiency [redacted] here results principally from adjustment to the amount allowable as a marital deduction.

[fol. 68]

TABLE OF CONTENTS

Schedule 1. Line adjustments
Schedule 1-A Explanation of changes in gross estate
Schedule 1-B Explanation of changes in deduction
Schedule 2 Computation of tax
[redacted]

FORM 1272
(REV. NOV. 1957)
TRANSLUCENT

U. S. TREASURY DEPARTMENT • INTERNAL REVENUE SERVICE

LINE ADJUSTMENTS – ESTATE TAX

ESTATE OF: Frederick F. Brewster

DATE OF DEATH: September 16, 1958

SCHEDULE: 1

	ITEM	RETURN (a)	ADDITIONS TO VALUE OF ESTATE (b)	DEDUCTIONS FROM VALUE OF ESTATE (c)	CORRECTED (d)
A	Real estate	543,200.00			543,200.00
B	Stocks and bonds	12,218,274.69	875.00		12,219,149.69
C	Mortgages, notes, and cash	219,651.46			219,651.46
D	Insurance				
E	Jointly owned property	123,872.76			123,872.76
F	Other miscellaneous property	96,349.00	1,393.75		97,742.75
G	Transfers during decedent's life				
H	Powers of appointment				
I	Annuities				
	TOTAL GROSS ESTATE	13,201,347.91	2,268.75		13,203,616.66
J	1. Funeral expenses and expenses incurred in administering property subject to claims	45,535.76		478,810.50	524,346.26
K	2. Debts of decedent	92,932.51			92,932.51
K	3. Mortgages and liens				
	4. Total of items 1 through 3	138,468.27		478,810.50	617,278.77
	5. Allowable amount of above deductions	138,468.27		478,810.50	617,278.77
L	6. Net losses during administration				
L	7. Expenses incurred in administering property not subject to claims				
	8. Total (Items 5 through 7)	138,468.27		478,810.50	617,278.77
M	9. Bequests, etc., to surviving spouse	4,345,890.71			2,165,160.02
	10. Adjusted gross estate	13,062,879.64			12,586,337.89
	11. Net amount deductible for bequests, etc., to surviving spouse (item 9 or ½ of item 10, whichever is smaller)	4,345,890.71	2,180,730.69		2,165,160.02
N	12. Charitable, public, and similar gifts and bequests	264,096.13	62,279.89		201,816.24
	Total Allowable Deductions, except specific exemption (totals of lines 8, 11, and 12)	4,748,455.11	2,243,010.58	478,810.50	2,984,255.03
	Specific exemption	~~60,000.00~~			60,000.00
	Total deductions	4,808,455.11			3,044,255.03
	TAXABLE ESTATE	8,392,892.80	2,245,279.33	478,810.50	10,159,361.63

[fol. 69]

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Form 886-A (REV. MAY 1950) TRANSLUCENT	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE EXPLANATION OF ITEMS	SCHEDULE NO. 1-A
NAME OF TAXPAYER Estate of Frederick F. Browster		Date of death: 9/16/58

EXPLANATION OF CHANGES IN GROSS ESTATE

	Return	Corrected
B—Stocks and Bonds		
Item #199 (j)	97,562.50	98,437.50
Addition to value of estate	875.00	
Totals	98,437.50	98,437.50

Adjustment as to valuation is based upon the mean between the high and low quotations on the valuation date.

F—Other Miscellaneous Property		
Item #19 (added)	-0-	654.21
#20 (added)	-0-	739.54
Addition to value of estate	1,393.75	
Totals	1,393.75	1,393.75

Adjustment is made to include in the gross estate insurance refunds collected by the estate (Item #19); and refund of 1949 and 1950 income tax collected by the estate (Item #20).

Form 886-A (Rev. May 1960) TRANSLUCENT

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

EXPLANATION OF ITEMS

SCHEDULE 1-B

Estate of Frederick F. Brewster

Date of death: 9/16/58

EXPLANATION OF CHANGES IN DEDUCTIONS

		Return	Corrected
J-1	Funeral expenses and expenses incurred in administering property subject to claims		
	Item #71	2,825.00	3,102.07
	Schedule Total	45,535.76	524,069.19
	Deduction from value of estate	478,810.50	
	Totals	527,171.26 ✓	527,171.26 ✓

Item #71 is allowed in the amount paid and to be paid as per the evidence on file.

Adjustment as to the ~~sum~~ schedule total is made to correct a mathematical error in the return.

M-0	Bequests, etc. to surviving spouse		
	Item #6	350,000.00	116,666.67
	#7	3,630,243.95	1,682,846.59
	Addition to value of estate		2,180,730.69
	Totals	3,980,243.95	3,980,243.95

Item #6, the deduction claimed in the amount of $350,000.00 as to the widow's allowance ordered by the Probate Court is disallowed in the amount claimed since the same did not constitute a vested property right passing from the decedent to the surviving spouse. The deduction is allowed in the amount of $116,666.67, being one-third of such allowance, which passes as part of the residuary estate, qualifying for the marital deduction.

Item #7, the deduction allowable as to the one-third share of the residuary estate qualifying for the marital deduction is computed as set forth in the statement annexed.

[fol. 71]

FORM 886-A (REV. MAY 1960) TRANSLUCENT	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE	SCHEDULE XXXXXX XXXXXX 1-B
NAME OF TAXPAYER	EXPLANATION OF ITEMS	
	Estate of Frederick F. Brewster	Date of death: 9/16/58

EXPLANATION OF CHANGES IN DEDUCTIONS

Computation of One-Third Interest in Residue

Adjusted Gross Estate		12,586,337.89
Less corpus deductions taken for income tax		81,567.91
Available for distribution		12,504,769.98
Less jointly owned property passing to spouse		123,872.76
Balance		12,380,897.22
LESS:		
Widow's Allowance	350,000.00	
BEQUESTS AND DEVISES:		
Clause II Real and personal property given to widow for life, remainder to charity	207,025.00	
" III Real estate specifically devised to widow	166,500.00	
" IV Personal property specifically bequeathed to widow	75,274.00	
" V to VII Miscellaneous Cash Bequests	222,650.00	
Codicil Special Fund	100,000.00	
DEATH TAXES:		
Connecticut Succession Tax on return as filed	845,140.69	
"Compromise" Connecticut Succession Tax on trust for John Brewster (Computation attached)	107,543.30	
Connecticut Estate Tax	149,096.47	
New Hampshire Tax	117.40	
Canadian Succession Duties	568.12	
Federal Estate Tax	5,108,442.48	7,332,357.46
Residue		5,048,539.76
One-Third interest qualifying for marital deduction (Item #7)		1,682,846.59

[fol. 71a]

FORM 886-A (REV. MAY 1940) TRANSLUCENT	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE EXPLANATION OF ITEMS	SCHEDULE XXXXX XXXXX 1-B
NAME OF TAXPAYER Estate of Frederick F. Brewster		Date of death: 9/16/58

Computation of "Compromise" Connecticut Succession Tax

on Remainder Interest in Trust for John Brewster

Value of trust at date of death		2,095,837.73
Theoretical income at 4%	83,833.51	
Factor for life interest	13.3380	
Value of life estate		1,118,171.36
Value of remainder interest		977,666.37
Class A tax on remainder interest at 8%	78,213.31	
Class C tax on remainder interest at 14%	136,873.29	
Total	215,086.60	
"Compromise" Tax on remainder interest (Average)		107,543.30

[fol. 71b]

FORM 886-A (REV. MAY 1960) TRANSLUCENT	U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE EXPLANATION OF ITEMS	SCHEDULE XXXXX XXXXX 1-B
NAME OF TAXPAYER Estate of Frederick F. Brewster		Date of death: 9/16/58

N-12 Charitable, public, and similar gifts and bequests	Return	Corrected
Item #1 (a)	30,000.00	23,150.70
#1 (b)	16,268.92	15,838.94
#2 (a)	147,827.21	143,920.19
#2 (b)	70,000.00	18,906.41
Addition to value of estate		62,279.89
Totals	264,096.13	264,096.13

Adjustment as to Items ##1(a), 1(b), 2(a) is made to apply the factor of .77169 as to the remainder interests passing to charity upon the death of the surviving spouse, age 74.

Adjustment as to Item #2(b) is made to ~~him~~ apply the factor of .77169 as to the amount payable to the City of New Haven, as per the evidence on file, upon the death of the surviving spouse, age 74.

[fol. 71c]

FORM 1273
(REV. NOV. 1957)
TRANSLUCENT

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

COMPUTATION OF ESTATE TAX

ESTATE OF	DATE OF DEATH	SCHEDULE
Fredorick F. Brewster	September 16, 1958	2

PART I

ITEM	RETURN	CORRECTED
1. Gross estate tax	4,866,798.53	6,210,908.46
2. Credit for State death taxes	837,616.56	845,258.09 *
3. Gross estate tax less credit for State death taxes *(item 1 minus item 2)*	4,029,181.97	5,365,650.37
PART II		
4. Credit for Federal gift taxes	-0-	-0-
5. Credit for tax on prior transfers	-0-	-0-
6. Credit for foreign death taxes	568.12	568.12
7. Total of credits under Part II *(total of items 4, 5, and 6)*	568.12	568.12
8. Net estate tax payable *(items 3 minus item 7)*	4,028,613.85	5,365,082.25
9. Previously assessed		4,028,613.85
10. Deficiency/~~Overassessment~~		1,336,468.40

REMARKS *(Explain if the tax determination may be adjusted due to credit evidence)*

* Limited to amount substantiated by credit evidence on file. Upon submission of evidence of further payment of state death taxes in the amount of $256,639.77; the allowable credit for state death taxes will be $1,101,897.86; the net estate tax payable will be $5,108,442.48; and the deficiency will be $1,079,828.63.

[fol. 71d]

IRS - D. C.

73

INSTRUCTIONS AS TO THE PREPARATION OF PROTESTS AGAINST FINDINGS OF EXAMINING OFFICERS

INCOME, ESTATE, OR GIFT TAXES

The protest and any additional statement of facts must be submitted to this office within 30 days of the date of the letter with which these instructions are enclosed. Such protest and statement must be submitted in duplicate under oath of the taxpayer (in the case of a corporation, the oath of a duly constituted officer). The oath requirement may be satisfied by executing the original of the protest under oath and conforming the copy to the original, that is, by making the copy identical with the original except that, in lieu of the signatures of the executing parties appearing on the original, the names of the executing parties may be inserted on the copy by typewriter or otherwise. The protest must contain the following information:

(a) The name and address of the taxpayer (in the case of an individual, the residence, and in the case of a corporation, the principal office or place of business);

(b) The designation by date and symbol of the letter advising of the proposed adjustments in tax liability with respect to which the protest is made;

(c) The designation of the year or years involved;

(d) An itemized schedule of the findings to which the taxpayer takes exception;

(e) A statement of the facts upon which the taxpayer relies with respect to each issue it is desired to contest. No reduction in taxes proposed nor increases in allowance of claims will be made unless the facts relied upon are submitted in writing and in verified form. All evidence except that of a supplementary or incidental character shall be submitted over the sworn signature of the taxpayer;

(f) In case the taxpayer desires a hearing before the Appellate Division of the Regional Commissioner's office, a statement to that effect; and

(g) In case the protest is prepared or filed by an attorney or agent, in addition to the signature of the taxpayer, it shall have thereon a statement signed by such attorney or agent showing whether or not he prepared it and whether or not the attorney or agent knows of his own knowledge that the facts therein are true.

If the taxpayer is represented by an attorney or agent, it is essential that the representative be qualified to practice before the Internal Revenue Service either by enrollment or under the provisions of section 10.7 of Treasury Department Circular No. 230 (I.R.B. 1959-7, 6), and that he be provided with a power of attorney signed by the taxpayer, authorizing him to act for the taxpayer. Powers of attorney must be furnished in duplicate with one additional copy for each taxable year in excess of one. If a power of attorney covering pertinent years is presently on file, a new power will not be necessary unless the taxpayer employs a different representative.

[fol. 71e]

YOUR APPELLATE RIGHTS

Upon receipt of a letter from the office of the District Director of Internal Revenue advising you of a proposed adjustment of your tax, you may execute an agreement form consenting to the adjustment or file a protest with the office from which the letter was received, and request a hearing before the Appellate Division of the Regional Commissioner's Office, if one is desired, in accordance with the above instructions. At such a hearing you may appear personally or be represented by an attorney or agent, also as provided in the instructions.

In the event an agreement or a written protest is not filed with the District Director of Internal Revenue, or in case a written protest is filed with the District Director of Internal Revenue, and an agreement is not reached in the Appellate Division of the Regional Commissioner's Office, and your case involves a deficiency, a final notice of the deficiency will be issued in which you will be granted 90 days within which to file a petition with The Tax Court of the United States.

If a petition is filed and docketed, the Appellate Division of the Regional Commissioner's Office will afford you an opportunity to settle your case without the necessity of a trial before The Tax Court. If a settlement cannot be reached, your case will be set down for a hearing before The Tax Court.

Appeal from the decision of The Tax Court may be made to the U. S. Court of Appeals.

If an overassessment only is proposed, the procedure is the same as above, except that your appellate rights do not extend beyond the Appellate Division of the Regional Commissioner's Office, unless the case involves a claim for refund disallowed in whole or in part. In such case, you may file suit with the United States District Court or the United States Court of Claims.

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE Publication No. 5 (Rev. 1-60)

U. S. GOVERNMENT PRINTING OFFICE : 1960 O - 596255

[fol. 72]

EXHIBIT N, ANNEXED TO AFFIDAVIT OF CHARLES E. ARNTSEN

[The Application for Determination of Proration of Federal Estate tax, a part of this exhibit, is omitted here since it has been reproduced above in Exhibit B to the Complaint.]

Order of Notice of Administration Account

District of Hamden, ss. Probate Court.

November 10, 1961

ESTATE OF FREDERICK F. BREWSTER late of HAMDEN, in said District, deceased

Harry E. Ross and The Second National Bank of New Haven, Executors, having exhibited their first administration account with said estate to this Court for allowance,—and made application for Determination of Proration of Federal Estate Tax, it is

ORDERED, That the 27th day of November, 1961, at 2:00 o'clock in the afternoon, at a Court of Probate to be held at Hamden, in said District, be appointed for a hearing on the allowance of said account, and application and that notice of the time and place of said hearing be given by publishing this order once in some newspaper having a circulation in said District,

By the Court,

/s/ Gertrude H. Collins
Gertrude H. Collins Clerk.

(A clipping of this notice is to be mailed to each distributee by the fiduciary)

[fol. 73] Return of Public and Personal Notice.

To the Probate Court for the District of Hamden:

Estate of Frederick F. Brewster late of the town of Hamden, to said District, deceased,

The subscriber hereby makes return, that pursuant to an order of said Court passed on the 10th day of November, 1961, she caused a copy of said order to be published in the Journal Courier, a newspaper having a circulation in said district, on the 13th day of November, 1961,

/s/ Gertrude H. Collins
Clerk

Subscribed and sworn to this 27th day of November 1961 before me

/s/ John E. McNerney
Judge
27th November, 1964

/s/ John E. McNerney, Judge

Return of Public and Personal Notice

To the Probate Court for the District of Hamden:

Estate of Frederick F. Brewster, late of the town of Hamden, in said District, deceased.

[fol. 74] The subscriber hereby makes return, that pursuant to an order of said Court, re first administration account and application for determination of proration of federal estate taxes, passed on the 10th day of November, 1961, he delivered a copy of said order or mailed a copy of said order postage prepaid in letters addressed to the following persons interested, to wit:—

Mrs. Frederick F. Brewster — William Patrick Brewster
Herbert L. Emanuelson, Jr. — Cornell University
Margaret Brewster Sewall — City of New Haven
District Director of Internal Revenue

all on or before the 21st day of November 1961.

/s/ John H. Weir
Attorney for Executors

Subscribed and sworn to this 27th day of November 1961 before me

/s/ Ruth Nicolas
Notary Public
My Commission Expires April 1, 1965.

Received, accepted and ordered recorded this 27th day of November 1961.

/s/ John E. McNerney Judge

[fol. 75] Probate Court,
District of Hamden—ss.

ESTATE OF FREDERICK F. BREWSTER, late of Hamden in said district, deceased

IN THE MATTER OF THE Acceptance of First Administration Account of the Executors and Application for Determination of Proration of Federal Estate Tax.

State of Connecticut,
County of New Haven—ss.

Herbert L. Emanuelson, Jr., of Hamden, Connecticut, being duly sworn, says that he is a Counselor-at-Law: that since his appointment as Guardian ad Litem herein, he has to the best of his ability made himself acquainted with the rights of his ward in the above entitled matter and that he has taken all the steps necessary for the protection of such rights to the best of his knowledge and as he believes that he has examined into the circumstances of the case

—and that there are no legal objections to the acceptance of said account

and to the proration of Federal estate tax as set forth in said application

/s/ Herbert L. Emanuelson, Jr.
Guardian ad Litem.

Subscribed and sworn to before me, this 22nd day of December, 1961.

/s/ Erna V. Freeberg, Notary Public

Received and ordered on record this 26th day of December, 1961.

/s/ John E. McNerney Judge

[fol. 76]

EMANUELSON AND WYNNE
ATTORNEYS AND COUNSELLORS
THE TRUST COMPANY BUILDING
NEW HAVEN 10, CONNECTICUT

Herbert L. Emanuelson, Jr.
John F. Winne

22 December 1961

The Honorable John F. McNerney
Judge of Probate
Memorial Town Hall
Hamden 18, Connecticut

Re: Executors' Application for Determination of Proration of Federal Estate Tax in the Estate of Frederick F. Brewster.

Dear Judge McNerney:

Since the hearing on the Application of the Executors for a Determination of the Proration of the Federal Estate Tax, I have spent considerable time in reviewing the brief filed on behalf of the Executors and in research of the Law.

If the tax were to be computed in accordance with the proposal submitted by the Executors, it will result in substantially the entire tax being paid by the Trusts created under the Will of Frederick F. Brewster from which the minor grandchildren benefit.

[fol. 77] An examination and careful reading of Article One of this decedent's last Will and Testament dated June 5, 1958, makes it clear that the tax on the pre-residuary gifts and transfers is to be borne by the residuary estate. Therefore, it remains necessary to determine whether this Article can apply with like effect to the residuary bequests.

This Article One is far more specific and detailed than the tax clause referred to by the brief in the case *New York Trust Co.* v. *Doubleday,* 144 Conn. 134. However, as the Supreme Court pointed out in that case, if a doubt exists upon examination of the will and the tax clause lacks the clarity necessary to make the proration statute inoperative, then reference must be made to the proration statutes, Sections 12-400 through 12-405 in order to determine the proper computation and proration of the Federal Estate tax.

After a careful examination of this will and the applicable law, together with a thorough reading of the Executors' brief, I am of the opinion that, despite the rather specific and detailed direction contained in Article One, considerable weight must be placed in the argument of the Executors that is the reference in Article One to "beneficiaries of this will" is to include residuary legatees and devisees as well as specific legatees and devisees, that the clause is without meaning and, in fact, a contradiction. I feel that the decision in the case *In the Matter of Estate of Pepper,* (1954) 307 N.Y. 242 must be given considerable weight in the consideration of this application. Therefore, since I am of the opinion that there is no "clear and un-

[fol. 78] ambiguous direction" against statutory apportionment in allocating the Federal Estate Tax against the residuary estate, the Executors should properly look to and

be controlled by Sections 12-400 through 12-405 of the Connecticut General Statutes.

Accordingly, I am filing herewith my report as Guardian ad Litem indicating that I have no objection to the granting of the Executors' Application for the Proration of the Federal Estate Tax.

Sincerely yours,

/s/ Herbert L. Emanuelson, Jr.
HERBERT L. EMANUELSON, JR.

Enclosure

Report of Guardian ad Litem

cc: Thompson, Weir, & Barclay, Esquires
205 Church Street
New Haven 10, Connecticut

State of Connecticut,
District of Hamden—ss. Probate Court

December 26, 1961

The foregoing application of the Executors for determination of proration of federal estate tax was heard on November 27, 1961. The applicants were present in Court by their attorneys and Herbert L. Emanuelson, Esq., the guardian ad litem for minor and unborn or undetermined [fol. 79] remaindermen of the trust under Part II of Article Nine of the will and codicil of said deceased, was likewise present.

The Court finds that due notice was given of the pendency of said application and of the time and place of the hearing thereon by publication of the foregoing order of this Court made on the 10th day of November, 1961, in a newspaper having a circulation in this District as appears by the foregoing return which is accepted. The Court

further finds that a copy of such order was delivered or mailed postage prepaid to each of the interested persons named below:

Mrs. Frederick F. Brewster	William Patrick Brewster
Herbert L. Emanuelson, Esq.	Cornell University
Margaret Brewster Sewall	City of New Haven

on or before the 21st day of November, 1961.

After due hearing had and submission by the guardian ad litem of his report dated December 22, 1961, and consideration thereof, this Court finds that the allegations of said application are proved and true, and it is

ORDERED, that the federal estate tax be prorated in the manner and in the amounts set forth in said application and that said Executors are authorized, empowered and directed to charge the prorated amounts against the persons against whom the tax is so prorated as set forth in said application.

/s/ JOHN E. McNERNEY
Judge

[fol. 80] PROBATE COURT
DISTRICT OF HAMDEN

ESTATE OF FREDERICK F. BREWSTER, late of Hamden, in said District, deceased.

MEMORANDUM OF DECISION
ON
EXECUTORS' APPLICATION TO DETERMINE
PRORATION OF FEDERAL ESTATE TAX

The executors, in conjunction with an administration account, have submitted a proposed proration of the federal estate tax, the effect of which is to relieve the residuary trust fund for the benefit of the widow of any part of federal estate taxes attributable to the residuary estate. This would leave the burden of such taxes on the

residuary trust funds for the benefit of the nine grandchildren of testator. The amount of taxes involved is not inconsiderable, so the question is one of importance in the settlement of the estate.

The guardian ad litem who represents the beneficiaries of all the trusts for grandchildren, excepting two who have become twenty-one years of age, has submitted a thoughtful memorandum. Despite the adverse effect of the executors' proposal upon his wards' interests, and the large amount involved, he concludes that the proposed proration is in accordance with the law of this state. My own consideration of the authorities leads me to a similar view and requires me to hold that the proration statute [fol. 81] (General Statutes, sec. 12-400) operates with respect to the residuary gifts. Under the circumstances here, particularly the contents of the will before the codicil was made, and the language of the codicil itself, and the changes which it wrought in the testamentary scheme, I cannot say that Article One of the will is a clear and unambiguous direction against proration among shares of the residue; and such it must be if there is to be no proration in the residue. See *New York Trust Co.* v. *Doubleday,* 144 Conn. 134; *Guaranty Trust Co.* v. *New York Cancer Committee,* 145 Conn. 542; *Jerome* v. *Jerome,* 139 Conn. 285. *The Matter of Estate of Pepper,* 307 N. Y. 242, is a most pertinent authority, as it demonstrates that an attempted construction of Article One to different effect renders it self-contradictory.

The proposed proration allows the trust for the widow to enjoy the benefit of the marital deduction for which it qualifies and which is used in arriving at the value of the real estate for federal tax purposes. This conforms to the proration statute, and I therefore approve the proration submitted by the executors.

December 26, 1961.

/s/ John E. McNerney
Judge

[fol. 82]

IN THE UNITED STATES DISTRICT COURT

ANSWER—Filed October 29, 1962

The defendant, United States of America, by and through its attorney, Robert C. Zampano, United States Attorney in and for the District of Connecticut, for its answer, admits, denies, alleges as follows:

1. Denies the allegations contained in paragraph 1 of the complaint, except admits that this is an action brought under Title 28, United States Code, Section 1346(a)(1) to recover estate taxes and interest, and alleges that these taxes and interest were paid on December 18, 1959, March 11, 1960, August 19, 1960, and May 29, 1962.

2. Admits the allegations contained in paragraph 2 of the complaint.

3. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint, except admits that Frederick B. Brewster died on September 16, 1958, and admits that what purports to be a copy of the decedent's will and codicil is attached to the complaint and marked Exhibit A.

4. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the complaint, except alleges that if the Probate Court for the District of Hamden [fol. 83] did enter an order as alleged by the plaintiff, this order was the result of a collusive and/or nonadversary proceeding and the plaintiff must factually substantiate the propriety of the allowance to the widow for support during the settlement of the estate.

5. Admits the allegations contained in the first sentence of paragraph 5 of the complaint. Denies the allegations contained in the second and third sentences of paragraph 5

of the complaint, except admits that certain property interests were reported on the estate tax return as passing to the decedent's wife and were allegedly deductible under Section 2056 of the Internal Revenue Code of 1954. Admits the allegations contained in the fourth sentence of paragraph 5 of the complaint.

6. Denies the allegations contained in the first sentence of paragraph 6 of the complaint, except alleges that on October 18, 1961, the District Director of Internal Revenue sent a letter to the executors proposing certain adjustments to the net estate, and further alleges that this letter speaks for itself as to the adjustments recommended therein. Admits the allegations contained in the second sentence of paragraph 6 of the complaint.

7. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the complaint, except admits that what purports to be a copy of an application and computation of the proration of the estate tax on the residuary bequest is attached to the complaint and marked Exhibit B.

[fol. 84] 8. Denies the allegations contained in paragraph 8 of the complaint, except alleges that on November 15, 1961, a letter was sent to the District Director of Internal Revenue at Hartford, Connecticut, enclosing an Order of Notice of Administration Account and an Application for Determination of Proration of Federal Estate Tax.

9. States that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the complaint, except alleges that if the Probate Court did in fact enter an order as alleged by the plaintiff, such order was the result of a proceeding which was collusive and/or nonadversary in nature.

10. Denies the allegations contained in paragraph 10 of the complaint, except admits that a so-called 90-day

letter dated April 6, 1962, was mailed to the executors by the Commissioner of Internal Revenue, which letter disclosed a deficiency of $1,333,194.35 in estate tax liability, and admits that a true and correct copy of this letter is attached to the complaint and marked Exhibit C. Further answering, the defendant alleges that this letter speaks for itself as to the statements contained therein.

11. Denies the allegations contained in paragraph 11 of the complaint.

12. Admits the allegations contained in paragraph 12 of the complaint, except alleges that the plaintiff executed the Waiver of Restrictions on Assessment and Collection of Deficiencies, Treasury Form 890-B, on May 14, 1962, and not on May 12, 1962, as alleged by the plaintiff.

[fol. 85] 13. Admits the allegations contained in paragraph 13 of the complaint.

14. Denies the allegations contained in paragraph 14 of the complaint.

15. Denies the allegations contained in paragraph 15 of the complaint, except admits that on June 7, 1962, the plaintiff filed a claim for refund and that a true copy of the claim for refund is attached to the complaint and marked Exhibit F, but defendant denies each and every allegation contained in the attached claim for refund except as expressly admitted herein.

16. Admits the allegations contained in paragraph 16 of the complaint.

17. As paragraph 17 of the complaint asserts matters of law, defendant is not required to answer paragraph 17. However, defendant admits that a reasonable amount of attorneys' fees incurred by the plaintiff in prosecuting the claim for refund may be allowable as a deduction to the estate under Section 2053 of the Internal Revenue Code of 1954 or, in the alternative, may be allowable as a deduc-

tion from income in the income tax return of the estate under Section 212 of the Internal Revenue Code of 1954.

18. Denies the allegations contained in paragraph 18 of the complaint, except admits that defendant has received monies of the plaintiff as admitted in this answer to paragraphs 1 and 13 of the complaint, and admits that [fol. 86] the defendant has not refunded any of the sums received to the plaintiff.

Wherefore, defendant prays for dismissal of plaintiff's complaint, judgment in its favor, the costs of this action, and any other relief the Court may deem just and proper.

Robert C. Zampano, United States Attorney, By Arnold Markle, Assistant United States Attorney.

This is to certify that a copy of the within and foregoing Answer has been mailed to Curtis K. Thompson, Esquire, 205 Church Street, New Haven, Connecticut, counsel for plaintiff, this 29th day of October, 1962.

Arnold Markle, Assistant United States Attorney.

[fol. 87]

IN THE UNITED STATES DISTRICT COURT

MEMORANDUM OF DECISION ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT—July 25, 1963

Plaintiff's motion for partial summary judgment on the issue of liability, pursuant to Rule 56(c), Fed. R. Civ. P., in this action to recover federal estate taxes in excess of $1,600,000 claimed to have been erroneously assessed and collected, raises questions of importance in the administration of the federal estate tax.

Facts

September 16, 1958 decedent died a resident of Connecticut, leaving a will and codicil. October 6, 1958 they were ad-

mitted to probate by the Probate Court for the District of Hamden, Connecticut.

Plaintiff, named as co-executor in the will, was appointed co-executor by the Probate Court and is now serving as sole executor, the co-executor having resigned May 7, 1962.

Decedent's will, executed June 5, 1958 and modified by a codicil executed July 1, 1958, after providing for certain specific bequests, left the residue in trust, one-third for the benefit of his widow and two-thirds for the benefit of his grandchildren surviving at his death.

[fol. 88] January 5, 1959 an application was filed with the Probate Court for an allowance for the support of decedent's widow during settlement of the estate. February 2, 1959, after hearing, the Probate Court entered an order granting such allowance in amount of $350,000. March 13, 1959, in compliance with the order, the executors paid to the widow the allowance in one lump sum.

December 16, 1959 a federal estate tax return was filed showing an estate tax liability of $4,028,613.85 based on a gross estate of $13,201,347.90 and a taxable estate of $8,392,892.80.

The federal estate tax return showed, as part of the marital deduction,[1] the widow's allowance granted by the Probate Court and one-third of the decedent's residuary estate bequeathed to the widow in trust under the will, the latter computed without reduction by the amount of federal estate tax attributable to the residuary estate.

October 18, 1961, following an IRS audit of the estate tax return, there was forwarded to the executors a report of the examination showing a deficiency due in amount of $1,336,468.40. This deficiency resulted principally from two determinations made by the IRS: (1) disallowance of the $350,000 widow's allowance as part of the marital deduction (but allowance of a marital deduction for this payment in amount of $116,666.67); and (2) decreasing the marital de-

[1] Pursuant to Int. Rev. Code of 1954, §2056, 26 U.S.C. §2056 (1958).

duction claimed by the estate from $3,630,243.95 to $1,682,-846.59. The latter determination was based on the IRS' computation of the widow's share of the residuary estate *after* state and federal estate taxes had been paid; whereas [fol. 89] the executors had computed the widow's share of the residue *before* estate taxes were taken into consideration.

November 10, 1961 the executors applied to the Probate Court for a determination of the proration of the federal estate tax.[2] Notice of the application and hearing thereon was given to the widow, two trust beneficiaries, the guardian ad litem for minor residuary trust beneficiaries and the District Director of Internal Revenue at Hartford. December 26, 1961, after hearing, the Probate Court filed a memorandum of decision and order directing, pursuant to the executors' application, that the federal estate tax on the pre-residuary bequests be deducted from the residuary estate before determining the amount of the widow's one-third part of the residue and that the federal estate tax attributable to the residuary bequests be prorated between those bequests.

April 6, 1962 the Commissioner sent to the executors a 90-day letter indicating that a deficiency of $1,333,194.35 in estate tax had been determined.

May 25, 1962 an assessment in amount of $1,333,194.35, plus interest of $195,285.58, was made against the estate.

May 29, 1962 the taxes and interest as assessed were paid.

June 7, 1962 a claim for refund in amount of $2,500,000 was filed.

August 14, 1962 the claim for refund was disallowed.

August 29, 1962 this action was commenced, pursuant to 28 U.S.C. §1346(a)(1), to recover federal estate taxes claimed to have been erroneously assessed and collected. [fol. 90] By the instant motion for partial summary judgment on the issue of liability, plaintiff seeks a determina-

[2] Pursuant to Conn. Gen. Stat. §§12-400 through 12-405 (1958).

tion on certain questions of law, upon the resolution of which the amount of plaintiff's recovery, if any, in this tax refund action depends.

Questions Presented

Three questions are presented, the answers to which are believed to be dispositive of this motion for partial summary judgment:

(1) Whether the widow's allowance under Connecticut law is a "terminable" interest and therefore not deductible from the gross estate as a marital deduction?

(2) Whether the widow's one-third share of the residuary estate, under the terms of the will, is to be deducted from the residue before the federal estate tax attributable to the residuary bequests is prorated among the residuary legatees?

(3) Whether the Connecticut Probate Court's determination with respect to the widow's allowance and its interpretation of the will with respect to proration of estate taxes are determinative of the rights of the federal government under the revenue laws?

The Court holds that questions (1) and (2) must be answered in the affirmative, question (3) in the negative.

[fol. 91]

I

Widow's Allowance

A widow's allowance granted pursuant to state law during administration of the estate is a "property interest passing from the decedent to his surviving spouse" [3] and

[3] Treas. Reg. §20.2056(e)-2(a) (1958):

"• • • An allowance or award paid to a surviving spouse pursuant to local law for her support during the administration of the decedent's estate constitutes a property interest passing from the decedent to his surviving spouse. • • •"

qualifies as a marital deduction which may be deducted from the gross estate to determine the taxable estate.[4] A limitation upon the widow's allowance as a marital deduction, claimed by defendant to be applicable here, requires that the allowance, to be deductible, must be one which will not terminate or fail.[5]

[fol. 92] Whether the widow's allowance is an interest which will terminate or fail, is to be determined by state law.[6]

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[4] Int. Rev. Code of 1954, §2056(a), 26 U.S.C. §2056(a) (1958):

"(a) *Allowance of marital deduction.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall . . . be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate."

[5] Int. Rev. Code of 1954, §2056(b)(1), 26 U.S.C. §2056(b)(1) 1958:

"(b) *Limitation in the case of life estate or other terminable interest.*—

(1) *General rule.*—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

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[6] *United States* v. *First National Bank & Trust Company of Augusta*, 297 F.2d 312, 316 (5 Cir. 1951); *Estate of Michael G. Rudnick*, 36 T.C. 1021, 1023 (1961).

Plaintiff contends that under Connecticut law a lump sum allowance to a widow becomes absolute and indefeasibly vested as soon as the order of the Probate Court directing payment becomes final. Defendant contends that since the right to receive the allowance terminates upon the occurrence of such contingencies as the remarriage or death of the widow and the Probate Court decree may be modified, revoked or set aside on appeal, any award, whether lump sum or installment, is terminable.

By statute[7] Connecticut provides for an allowance to the [fol. 93] surviving spouse during settlement of the estate. Under this statute, the Probate Court exercises "a primary jurisdiction in that discretion is reposed in it to determine whether to make the allowance, and, if it is made, its amount and duration."[8] Among the important considerations to be weighed by the Probate Court in exercising its discretion is the estimated length of time for settlement of the estate and the advisability of a lump sum or periodic installment form of allowance.[9]

A widow's allowance, although characterized as a "statutory right" in one decision,[10] is said to be "not a property right" but "in the nature of a continuance of the support after the husband's death which he or his estate had furnished her before his death".[11] Being within the discretion of the Probate Court, the allowance is subject to an

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[7] Conn. Gen. Stat. §45-250 (1958):

> "The court of probate may allow out of any real or personal estate of a deceased person in settlement before such court such amount as it may judge necessary for the support of the surviving spouse or family of the deceased during the settlement of the estate. . . . "

[8] *Baldwin* v. *Tradesmens National Bank*, 147 Conn. 656, 660, 165 A.2d 331, 333 (1960).

[9] *Havens' Appeal*, 69 Conn. 684, 697-701, 38 Atl. 795, 799-801 (1897).

[10] *Cowles* v. *Cowles*, 74 Conn. 24, 26, 49 Atl. 195, 196 (1901).

[11] *Baker's Appeal*, 56 Conn. 586, 588 (1888).

equitable balancing of interest.[12] Acting on equitable prin-
[fol. 94] ciples, the Probate Court under changing circumstances may revoke or modify its decree granting the allowance.[13]

Plaintiff in the instant case does not dispute the power of the Probate Court to revoke or modify its order granting an allowance to be paid in installments. Rather, plaintiff relies (i) on the fact that the allowance here was in the form of a lump sum award, and (ii) on language in *Havens' Appeal*[14] construing the effect of a revocation or

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[12] " . . . an allowance cannot be granted for the purpose of enriching the widow at the expense of others entitled to the estate or of the rights of creditors in case of insolvency." *Baldwin* v. *Tradesmens National Bank, supra* note 8, at 662, 165 A.2d at 334. See also *Catalano* v. *Catalano,* 148 Conn. 288, 292, 170 A.2d 726, 728 (1961) (marriage contrary to Connecticut public policy deprives surviving spouse of allowance); *Alexander* v. *Alexander,* 107 Conn. 101, 106, 139 Atl. 685, 687 (1927) (abandonment by surviving spouse during lifetime of decedent bars allowance); *Cowles* v. *Cowles,* 74 Conn. 24, 49 Atl. 195 (1901) and *Staub's Appeal,* 66 Conn. 127, 33 Atl. 615 (1895) (valid antenuptial agreement estops surviving spouse from claiming allowance).

[13] *Williamson's Appeal,* 123 Conn. 424, 427, 196 Atl. 770, 771 (1937); *Reiley* v. *Healey,* 122 Conn. 64, 78, 187 Atl. 661, 667 (1936).

[14] *Havens' Appeal, supra* note 9, at 696, 38 Atl. at 799:

> "Had the court, anticipating the estate would be settled in one year, ordered that five thousand dollars be allowed during settlement, the executors could pay no more, however long the settlement might be delayed, unless a new order should be made. Had the court, anticipating the estate would not be settled in four years, ordered that twenty thousand dollars be allowed, the executors could not pay less, however soon the estate might be settled, unless the order were revoked before payment had been made. But the court, recognizing the uncertainty attending the settlement of a large estate, has determined the amount necessary for the widow's support during settlement, in accordance with the time the settlement shall consume, and has ordered that so much per month be allowed during settlement. The executors are thereby authorized to make such monthly payments, until the order is modi-

modification by the Probate Court subsequent to payment of an allowance to a widow.

The Connecticut courts have not distinguished between lump sum and installment allowances in discussing the power of the Probate Court to revoke or modify their orders granting widows' allowances. Absent controlling authority [fol. 95] and recognizing the power of Probate Courts to revoke or modify their decrees, this Court does not find the distinction between lump sum and installment allowances to be helpful in resolving the present question.

It appears that the Probate Court has the power to direct that the widow's allowance be charged against her interest in the estate.[15] The power of the Probate Court to impose an equitable charge against the interest in the estate of the decedent passing to the widow under the will suggests that the widow's allowance, whatever its form of payment, did not, prior to the recent statutory change,[16]

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fied, revoked, or set aside upon appeal; but no revocation can make illegal, payments previously made in pursuance of the order."

[15] *Baldwin* v. *Tradesmens National Bank, supra* note 8, at 663, 165 A.2d at 334; *Havens' Appeal, supra* note 9, at 701, 38 Atl. at 800-801.

[16] Conn. Gen. Stat. §45-250 was amended in 1961 by Public Act No. 370 (approved June 8, 1961, effective October 1, 1961) which added the following two sentences:

"The right to support of a surviving spouse shall vest in such spouse upon the death of his spouse and shall not terminate with his subsequent death or remarriage. Any amount for support allowed to a surviving spouse shall become the absolute property of such surviving spouse or, if deceased, of his estate, without restriction as to use, encumbrance or disposition, and such amount may, upon order of the court, be paid in a lump sum."

This amendment clearly makes the widow's allowance in Connecticut eligible for the marital deduction.

Defendant argues that this amendment confirms that prior thereto the widow's allowance was not a vested, non-terminable interest in Connecticut; otherwise "we can only assume that the Connecticut

[fol. 96] become absolute and indefeasibly vested as soon as the order of the Probate Court directing payment became final.

The Court concludes that under Connecticut law, prior to the 1961 amendment to Section 45-250,[17] the widow's allowance, whether in lump sum or installment form, was subject to revocation or modification; might be the subject of an equitable charge against the widow's interest in the estate; did not become absolute and indefeasibly vested as soon as the order of the Probate Court directing payment became final; was, therefore, as the time it was granted, a terminable interest; and, under Section 2056(b)(1) of the Internal Revenue Code of 1954,[18] is not eligible as a marital deduction.

II

Federal Taxation of Residue of Estate

A major issue before the Court on the instant motion—the issue to which the largest revenue tag is attached—is whether any part of the federal estate tax is chargeable to

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legislature enacted an unnecessary law, an assumption which should not be lightly made."

Plaintiff, on the other hand, argues that "There is no question of changing the law; it is merely a clarification, and the rule that 'an amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act' is applicable. *City of Hartford* v. *Town of Suffield*, 127 Conn. 341, 346, 77 A.2d 760, 762 (1950)."

The Court holds this amendment to be not applicable to the instant case. Moreover, absent authoritative legislative history, the Court finds no basis in the amendment from which to draw inferences one way or the other with respect to the terminability of the interest in a widow's allowance under Connecticut law prior to the amendment.

[17] Conn. Gen. Stat. §45-250 (1961).

[18] Int. Rev. Code of 1954, §2056(b)(1), 26 U.S.C. §2056(b)(1) (1958).

[fol. 97] the interest passing to the widow under the will. This issue turns chiefly upon whether there is a clear and unambiguous direction in the will against proration of taxes.

The original will, executed June 5, 1958, left the residue in trust, one-third for the benefit of the widow and two-thirds for the benefit of the grandchildren surviving at decedent's death. The trust for the widow did not qualify as a marital deduction. All residuary shares were taxable alike.

Article One of the will, which contains the "tax clause", provides:

> "ONE: I direct my executors hereinafter named to pay out of my estate my just debts and funeral expenses and any death taxes which may be legally assessed upon or with respect to any property which is required to be included in my gross estate under the provisions of any death tax law. The provisions of any statute requiring the apportionment of proration of such taxes among the beneficiaries of this will or the transferees of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate."

By a codicil executed July 1, 1958, the will was modified so that the residuary trust for the widow qualified for the marital deduction.[19]

The codicil also provided, "In all other respects I hereby republish and confirm my said will."

[fol. 98] The Internal Revenue Code of 1954 allows a marital deduction to the extent of fifty percent of the value of the adjusted gross estate.[20] In determining the value of the marital deduction, the impact of the federal estate

[19] The qualification of the widow's trust for a marital deduction is not disputed.

[20] Int. Rev. Code of 1954, §2056, 26 U.S.C. §2056 (1958).

tax upon the share passing to the widow must be taken into account.[21] Under these statutory provisions there must be a determination whether any part of the federal estate tax is chargeable to the interest passing to the widow.

Applicable state law governs distribution of the estate and the ultimate impact of the federal estate tax.[22] By [fol. 99] statute[23] Connecticut requires death taxes to be prorated equitably except under certain circumstances, the

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[21] Int. Rev. Code of 1954, §2056(b)(4), 26 U.S.C. §2056(b)(4) (1958):

> (4) *Valuation of interest passing to surviving spouse.*— In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section—
>
> (A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; and
>
> (B) where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined."

[22] *Harrison* v. *Northern Trust Co.*, 317 U.S. 476 (1943); *Riggs* v. *Del Drago*, 317 U.S. 95 (1942); *Rogan* v. *Taylor*, 136 F.2d 598 (9 Cir. 1943).

[23] Conn. Gen. Stat. §§12-400 through 12-405 (1958).

Section 12-401(a), insofar as here applicable, provides:

> "(a) When it appears from any administration account or in any appropriate proceeding in the probate court that an executor . . . has paid . . . the federal estate tax . . . the amount of the tax so paid, except when a testator otherwise directs in his will . . . shall . . . be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. . . . [I]n making such proration, allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate . . . "

one here applicable being the direction of the testator to the contrary in his will. If the Connecticut proration statute applies, as plaintiff contends, the trust for the widow, being itself exempt from federal estate taxes, should bear no part of such taxes.[24] If, on the other hand, the proration statute does not apply, as defendant contends, then the federal estate taxes are to be prorated among all shares of the residue, including the widow's trust.[25]

[fol. 100] The specific question for determination is whether the testator intended, under Article One of his will, that the Connecticut proration statute should apply to the residuary shares of his estate.

Certain fundamental canons of construction must be followed.

Republication of a will in the codicil, as here, in effect is the making of a new will as of the date of the codicil, with such changes in the will as are contained in the codicil.[26] That does not mean, however, that in construing the instrument the development of testamentary intent through the will and the codicil and the circumstances surrounding their

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[24] Conn. Gen. Stat. §12-401 (1958); *Guaranty Trust Co.* v. *New York City Cancer Committee*, 145 Conn. 542, 548, 144 A.2d 535, 538 (1958); *New York Trust Co.* v. *Doubleday*, 144 Conn. 134, 143, 128 A.2d 192, 196 (1956); *Jerome* v. *Jerome*, 139 Conn. 285, 292, 93 A.2d 139, 143 (1952).

[25] Resolution of these competing claims with respect to the computation of federal estate tax liability is of importance to both sides. Allowance of plaintiff's claim would result in a decrease of the adjusted gross estate by the entire one-third share of the widow to determine the taxable estate. Acceptance of defendant's claim would result in a larger taxable estate with a corresponding larger tax liability, since the widow's share, before determining the amount eligible as a marital deduction, would be subjected to its proportionate share of the federal estate tax. With a gross estate of $13,201,347.90, the federal estate tax difference between these two positions is substantial.

[26] *First National Bank & Trust Co.* v. *Baker*, 124 Conn. 577, 583, 1 A.2d 283, 286 (1938); *Griffith* v. *Adams*, 106 Conn. 19, 32, 137 Atl. 20, 25 (1926).

execution is to be disregarded and the whole will read as though it were originally made at the date of the codicil. "From a will and its several codicils, like a statute with its later amendments, the maker's full intention is to be gathered." [27]

Moreover, in attempting to determine the intent of the testator, it is necessary to examine not only the particular phrase in question but the language of the entire will in the light of the circumstances which surrounded the testator at the time he executed it, "the real question being, not what did the testator mean to say, but what did he mean by what he did say." [28]

[fol. 101] Finally, the standard which the Court must apply in determining the legal effect of testator's will upon the question of proration of the federal estate tax is that, unless there is a "clear and unambiguous" direction in the will to the contrary, the federal estate tax is to be prorated as provided for in the Connecticut proration statute.[29]

Applying the "clear and unambiguous" standard, the Court finds that Article One of the will is not a clear and unambiguous direction against proration of taxes in the residue of the estate. Accordingly, the Court holds that the Connecticut proration statute applies to the residuary shares of the estate and the widow's trust, being itself exempt from federal estate taxes, should bear no part of such taxes.

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[27] *First National Bank & Trust Co.* v. *Baker, supra* note 26, at 583, 1 A.2d at 286; *Giddings* v. *Giddings*, 65 Conn. 149, 160, 32 Atl. 334, 335 (1894).

[28] *Swole* v. *Burnham*, 111 Conn. 120, 122, 149 Atl. 229, 230 (1930); *McLaughlin* v. *Green*, 136 Conn. 138, 142, 69 A.2d 289, 291 (1949).

[29] *Morgan Guaranty Trust Co.* v. *Huntington*, 149 Conn. 331, 335, 179 A.2d 604, 607-608 (1962); *New York Trust Co.* v. *Doubleday, supra* note 24, at 141, 128 A.2d at 195 (1956); *Jerome* v. *Jerome, supra* note 24, at 289, 93 A.2d at 141; *McLaughlin* v. *Green, supra* note 28, at 142, 69 A.2d at 291.

The first sentence of Article One of the will, in providing for the payment of death taxes, shifted the tax burden for the pre-residuary transfers to the residue of the estate.[30] This shift in the tax burden focuses attention upon the meaning of " . . . beneficiaries of this will or the transferees of such property . . . " in the second sentence of Article One. At the time of making the original will, the residuary shares, not being qualified for charitable or [fol. 102] marital deductions, were taxable and not entitled to any exemption. To attribute to the testator a direction against proration where no proration was possible, would render uncertain what the testator "did . . . mean by what he did say." [31]

Support for this construction may be found in a recent New York Court of Appeals decision:[32]

> "In considering the testator's intention at the time he drafted the tax clause, one further aspect of his original will should be considered. Under the 1949 will, prior to amendment by codicil, the four equal residuary trusts therein set up were fully taxable, since no charitable deduction was allowable for the remainder interests of the Foundation which were contingent upon failure of primary private individual remaindermen.
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> "Under the original scheme, then, taxes would have been paid out of the capital of the trusts, for there is

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[30] This construction apparently is conceded by both parties. "The directive in the will that all estate taxes be paid from the residue is not a directive against the prorating of estate taxes among residuary gifts." *New York Trust Co.* v. *Doubleday, supra* note 24, at 142, 128 A.2d at 196.

[31] *Swole* v. *Burnham, supra* note 28, at 122, 149 Atl. at 230.

[32] *In the Matter of Will of Shubert*, 10 N.Y.2d 461, 475-476, 180 N.E.2d 410, 417-418, 225 N.Y.S.2d 13, 23 (1962).

The statutes of New York and Connecticut concerning proration of federal estate taxes are similar. See *McLaughlin* v. *Green, supra* note 28, at 142, 69 A.2d at 291.

> no apportionment of taxes between income beneficiaries and remaindermen of a fully taxable trust. . . . Each of the four trusts under the original will thus had the same value for estate tax purposes, and the tax clause, drawn as part of the original will, was meaningless insofar as intra-residuary apportionment was concerned. *Whether apportionment was directed or not,* the tax burden on each residuary trust would [fol. 103] have been the same. The residuary bequests were changed by codicil. Hence it is difficult to perceive how the clause now may be read as an express direction to accomplish something totally unnecessary when it was drafted." (emphasis added)

Plaintiff in the instant case claims, and the Court agrees, that there also is a conflict within the "tax clause" which renders ambiguous the intention of the testator concerning proration. The first sentence shifts the tax burden to the residue; but, according to the second sentence of Article One, the "beneficiaries", assuming they are intended as the residuary legatees, are not to be held for the 'ultimate payment" of death taxes. Such directions in the "tax clause" are at cross-purposes. Obviously some legatees must pay the death taxes out of their share of the estate. To direct that neither pre-residuary nor residuary legatees are to be liable for death taxes, although testator must have known that the taxes must come from one or the other of these sources, renders such directions ambiguous.

In a similar situation the New York Court of Appeals held that conflicting directions in the tax clause precluded a clear and unambiguous direction against statutory apportionment;[33]

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[33] *In Re Pepper's Estate,* 307 N.Y. 242, 250, 120 N.E.2d 807, 811 (1954).

"Someone is obligated to pay the state taxes. . . . if the early direction be followed, viz., that the trusts [fol. 104] be set up freed from all deductions for inheritance, transfer, estate or any other tax, then the direction that the taxes be paid out of the residuary estate is meaningless for the property going into the trusts comprises the entire residuary estate and after the trusts are set up freed from taxes no residuary remains from which taxes can be paid. The first clause directing the trusts to be set up free of tax and the last clause directing all taxes be paid out of the residuary estate cancel out or neutralize each other. The net result is that this will does not contain a direction against statutory apportionment. However, in deciding this case we need not go that far. We need only hold that it *does not contain a clear and unambiguous direction to that effect.*"

Defendant's position, not wholly without appeal, may be summarized briefly: the bare wording of the "tax clause" does direct against proration; the joining of "death taxes" with "just debts" and "funeral expenses" does permit the inference that the testator intended federal estate taxes, as another expense, to be deducted from the residue prior to distribution; and the widow's share was to bear its proportionate burden.

Plaintiff's construction of the tax clause in this will squares, in the opinion of the Court, closer than does that of defendant, with a rational intent of the testator, "the real question being, not what did the testator mean to say, but what did he mean by what he did say."[34]
[fol. 105] The best that can be said for defendant's construction of the tax clause is that, considered in conjunction with that of plaintiff, it gives rise to the very ambiguity which robs the clause of that clarity and lack of

[34] *Swole* v. *Burnham*, *supra* note 28, at 122, 149 Atl. at 230.

ambiguity[35] necessary to constitute a direction against statutory apportionment.

III

Effect of Connecticut Probate Court Decrees Upon Rights of Federal Government Under Revenue Laws

In deciding the widow's allowance question in favor of defendant[36] and the proration of estate taxes question in favor of plaintiff,[37] the Court has considered, but has not regarded itself bound by, the determinations of the Probate Court on each of these questions.

The rationale for the decision of this Court that the decrees of the Probate Court are not binding in the instant case is found in the following statement by Judge Clark (in a case factually distinguishable from the instant case).[38]

> "Although such a decision of the state court may bind the parties in the settlement of their legal rights [fol. 106] between themselves, yet the determination of tax consequences is not to be so resolved. The decision of a state court might well turn on elements of estoppel, laches, acceptance of benefits, rights of third parties, and other incidents of a decisive nature as to them, but in no proper sense to be held prejudicial

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[35] Webster's New International Dictionary (3d ed. 1963):

> "ambiguity . . . 2a(1): The condition of admitting of two or more meanings, of being understood in more than one way, or of referring to two or more things at the same time."

[36] *Supra* pp. 6-12.

[37] *Supra* pp. 13-21.

[38] *Daine* v. *Commissioner*, 168 F.2d 449, 451 (2 Cir. 1948). See *Kelly's Trust* v. *Commissioner*, 168 F.2d 198 (2 Cir. 1948) (once state court judgment is appealed, it loses whatever nonadversary or consent quality it may have had).

to the federal revenue. Hence it is clear that the retroactive judgments of state courts do not determine the rights of the Federal Government under its tax laws."

Judge Hincks, while a judge of this Court, although holding, as did the Probate Court, that the testator intended to create separate trusts, rejected any notion that the decree of the Probate Court was binding on this Court.[39]

"The decree of the Probate Court finding that the testator intended to create separate trusts is not binding here. No notice other than by publication was given to the defendant, and the proceeding was uncontested. In *Kelly's Trust* v. *Commissioner*, 168 F.2d 198 (1948), a similar case, the Second Circuit through Judge Frank held that where an appeal is taken the proceeding becomes adversary in nature and binding upon the federal courts. No appeal was taken in the present case, however. See also in this con- [fol. 107] nection, *Reid* v. *Commissioner*, 6 T.C. 438 (1946), where a state court judgment was not followed. I do feel, however, that in view of *Redpath* v. *Auchincloss*, 132 Conn. 690 (1946), the Connecticut courts would find separate trusts in a situation like the present."

The Court of Appeals for the Tenth Circuit has stated succinctly the rule that a state court decree which adversely affects tax rights of the United States and is based upon a nonadversary or collusive proceeding[40] does not

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[39] *McHarg* v. *Fitzpatrick*, 45 Am. Fed. Tax R. 1028, 1033 (D. Conn. 1953), *aff'd*, 210 F.2d 792 (2 Cir. 1954).

[40] As to what constitutes a nonadversary or collusive proceeding, see *Freuler* v. *Helvering*, 291 U.S. 35 (1934); *Blair* v. *Commissioner*, 300 U.S. 5 (1937); *Saulsbury* v. *United States*, 199 F.2d 578, 580 (5 Cir. 1952), *cert. denied*, 345 U.S. 906 (1953).

foreclose the federal courts from determining the tax liability of the parties:[41]

> "Legal rights and interest of parties in property are created and determined by state law but the manner in which and the extent to which such rights and interests shall be subjected to federal tax is determined by federal law. *Morgan* v. *Commissioner*, 309 U.S. 78, 626, 60 S. Ct. 424, 84 L. Ed. 585; *Brodrick* v. *Gore*, 10 Cir., 224 F.2d 892; *Brodrick* v. *Moore*, 10 Cir., 226 F.2d 105.
>
> "While rights and interests of parties in property are created and determined by state law, an order or judgment of a state court obtained through collusion, or attended with some other badge of fraud, or entered in a nonadversary proceeding, is not binding as between one or more parties to such proceeding and [fol. 108] the United States in respect to income or estate tax imposed by federal legislation."

Some federal courts have held likewise;[42] others have held to the contrary.[43]

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[41] *In Re Sweet's Estate*, 234 F.2d 401, 404 (10 Cir. 1956), *cert. denied*, 352 U.S. 878 (1956).

[42] *Kelly's Trust* v. *Commissioner*, 168 F.2d 198 (2 Cir. 1948); *cf. Daine* v. *Commissioner*, 168 F.2d 449, 451 (2 Cir. 1948); *Faulkerson's Estate* v. *United States*, 301 F.2d 231, 232-233 (7 Cir. 1962), *cert. denied*, 371 U.S. 887 (1962); *Stallworth's Estate* v. *Commissioner*, 260 F.2d 760, 763 (5 Cir. 1958); *Merchants National Bank & Trust Co.* v. *United States*, 246 F.2d 410, 415-418, and cases cited at 417 n. 12 (7 Cir. 1957), *cert. denied*, 355 U.S. 881 (1957); *Pitts* v. *Hamrick*, 228 F.2d 486, 490-491 (4 Cir. 1955); *Brodrick* v. *Moore*, 226 F.2d 105, 108 (10 Cir. 1955); *Brodrick* v. *Gore*, 224 F.2d 892, 895-896 (10 Cir. 1955); *Wolfsen* v. *Smyth*, 223 F.2d 111, 113-114 (9 Cir. 1955); *Newman* v. *Commissioner*, 222 F.2d 131, 136 (9 Cir. 1955); *cf. Doll* v. *Commissioner*, 149 F.2d 239, 241-242 (8 Cir. 1945), *cert. denied*, 326 U.S. 725 (1945); *First-Mechanics National Bank of Trenton* v. *Commissioner*, 117 F.2d 127, 129-130 (3 Cir. 1940); *Brainard* v. *Commissioner*, 91 F.2d 880, 883-884 (7 Cir. 1937), *petition for cert.*

[fol. 109] The two decrees of the Probate Court in the instant case were final judgments on matters within that court's exclusive jurisdiction. As such, the decrees are conclusive determinations—*between the parties to the Probate Court proceedings*—of the widow's property rights, first, to the widow's allowance, and, secondly, to receive her share of the residuary estate without reduction by the federal estate tax attributable to the residue.

Defendant does not contend that plaintiff failed to follow the required procedure in submitting the issues to the Probate Court and in obtaining the decrees. Defendant does contend that the decrees of the Probate Court were "the result of a collusive and/or nonadversary proceeding."

This Court, upon the record before it in the instant case, is not able to make a finding as to whether the proceedings in the Probate Court were collusive or nonadversary in nature. Nor does this Court believe such a finding is either necessary or appropriate to a determination of the questions presently before the Court. Suffice it to say that, as this Court understands the delineation of federal power

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dismissed, 303 U.S. 665 (1938); *McHarg* v. *Fitzpatrick*, 45 Am. Fed. Tax R. 1028, 1033 (D. Conn. 1953), *aff'd*, 210 F.2d 792 (2 Cir. 1954); *First National Bank of Montgomery* v. *United States*, 176 F. Supp. 768, 772-775 (M.D. Ala. 1959), *aff'd*, 285 F.2d 123 (5 Cir. 1961); See 10 Mertens, Law of Federal Income Taxation, §61.03 (Zimet Rev.) (1958).

[43] *Darlington's Estate* v. *Commissioner*, 302 F.2d 693, 694-695 (3 Cir. 1962); *Beecher* v. *United States*, 280 F.2d 202, 203-204 (3 Cir. 1960); *Babcock's Estate* v. *Commissioner*, 234 F.2d 837, 841-842 (3 Cir. 1956); *Gallagher* v. *Smith*, 223 F.2d 218, 222-227 (3 Cir. 1955) (en banc); *Goodwin's Estate* v. *Commissioner*, 201 F.2d 576, 581-582 (6 Cir. 1953); *Nashville Trust Co.* v. *Commissioner*, 136 F.2d 148, 150-152 (6 Cir. 1943); *Plunkett* v. *Commissioner*, 118 F.2d 644, 648 (1 Cir. 1941); *cf. Channing* v. *Hassett*, 200 F.2d 514, 518-519 (1 Cir. 1952); *Martinson* v. *Wright*, 181 F. Supp. 534, 536 (D. Idaho 1959); *Gordon* v. *United States*, 163 F. Supp. 542, 545-546 (W.D. Mo. 1958); *Stackpole* v. *Granger*, 136 F. Supp. 382, 387-388 (W.D. Pa. 1955); *Weyenberg* v. *United States*, 135 F. Supp. 299, 302-303 (E.D. Wis. 1955).

indicated by Judge Clark[44] and Judge Hincks[45] in this type of situation, it is the duty of this Court to make an independent determination of the rights of the taxpayer and of the rights of the government under the revenue laws of the United States. While this Court will not blind itself to any help which may come from adjudications of the state courts or from any other source, in the end [fol. 110] questions such as those presented by the instant motion for summary judgment, being questions peculiar to the administration of the federal revenue laws, must be decided independently of any state court adjudications. And certainly the decrees of the Connecticut Probate Court—which is not a court of record and most of the judges of which are laymen, not lawyers—under no circumstances can be construed as binding and conclusive upon a federal court in construing and applying the federal revenue laws.

The basis upon which this Court rejects the claimed conclusive effect of the decrees of the Connecticut Probate Court is a broad one, and deliberately so.

Conclusion

For the reasons indicated above, summary judgment on the issue of liability may be entered (1) in favor of defendant on the question of the widow's allowance, and (2) in favor of plaintiff on the question of proration of estate taxes.

The Court assumes, in view of its disposition of these questions, that the parties will be able to stipulate for final judgment.[46] Accordingly, it is ordered that final judgment

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[44] *Daine* v. *Commissioner, supra* note 38.

[45] *McHarg* v. *Fitzpatrick, supra* note 39.

[46] In a letter to the Court dated January 15, 1963, defendant's counsel indicated the following manner of handling the computa-

[fol. 111] be entered within 30 days from the date of this decision; upon stipulation as to the form and amount of judgment, if possible; if not, the form and amount of judgment will be settled upon notice.

If any issues remain unresolved after the procedure suggested above, the Clerk is directed to set the case for trial at the head of the calendar for the next session of court cases to be tried at New Haven.

Dated at New Haven, Connecticut, this 25th day of July, 1963.

William H. Timbers, United States District Judge.

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tions in the event the Court should decide the issues as it now has decided them:

"With respect to the widow's allowance, if this Court should hold that it constitutes a terminable interest (as we contend), then, as a matter of law, the estate of Frederick F. Brewster is not entitled to a marital deduction under Section 2056 of the Internal Revenue Code of 1954.

* * * * * * * *

"If, however, this Court concludes that there was no clear direction against proration within the residue, then the plaintiff is entitled to recover as a matter of law. However, it should be pointed out that the amount which the plaintiff would be entitled to recover must be recomputed based upon a proper application of the Connecticut proration statute, and a proper appraisal of the estate tax liability which would result from the application of the proration statute."

[fol. 112]

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

[Title omitted]

DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT—
Filed September 20, 1963

The defendant, United States of America, by and through its attorney Robert C. Zampano in and for the District of Connecticut, moves this Court to enter judgment in the above captioned case in the amount of $1,295,208.01, plus interest allowable by law, which consists of a refund of tax in the amount of $1,129,726.32, plus interest in the amount of $165,481.69.

United States of America, By Robert C. Zampano, United States Attorney.

[fol. 113]

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

[Title omitted]

PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT—
Filed September 23, 1963

The Second National Bank of New Haven, Executor of the Will of Frederick F. Brewster, plaintiff herein, acting by its attorneys, respectfully moves that judgment be entered in the above entitled matter in the form and amount set forth in the proposed judgment annexed hereto and marked Exhibit A.

The Second National Bank of New Haven, Executor of the Will of Frederick F. Brewster, Late of Hamden, Deceased, By Thompson, Weir & Barclay, Its Attorneys.

[fol. 114]

EXHIBIT A, ANNEXED TO PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action No. 9435

THE SECOND NATIONAL BANK OF NEW HAVEN, Executor of the Will of Frederick F. Brewster, Late of Hamden, Connecticut, Deceased

Plaintiff

—against—

UNITED STATES OF AMERICA

Defendant

JUDGMENT

A motion by the plaintiff above named for partial summary judgment in its favor on the question of liability pursuant to Rule 56(c) of the Federal Rules of Civil Procedure having been duly brought on to be heard, and the Court having made an order thereon denying said motion on the question of the widow's allowance and granting said motion on the question of proration of federal estate taxes, it is hereby

ORDERED, ADJUDGED and DECREED that the plaintiff recover of the defendant $1,485,293.86 with interest at the rate of [fol. 115] 6% per annum from the 29th day of May, 1962; and it is hereby further

ORDERED, ADJUDGED and DECREED that this Court retain jurisdiction of this action for the purpose of determining the amount of any deduction for federal estate tax pur-

poses to which plaintiff is entitled for attorneys' fees and expenses incurred in the prosecution of this action.

Dated at New Haven, Connecticut, this day of , 1963.

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United States District Judge

IN THE UNITED STATES DISTRICT COURT

ORDER ON CROSS-MOTIONS FOR ENTRY OF JUDGMENT—December 2, 1963

The Court on July 25, 1963 having ordered that partial summary judgment on the issue of liability, pursuant to Rule 56(c), Fed. R. Civ. P., be entered (1) in favor of defendant on the question of the widow's allowance, and (2) in favor of plaintiff on the question of proration of federal estate taxes; and

Cross-motions having been filed by the respective parties for entry of judgment, plaintiff requesting that judgment in amount of $1,485,293.86 plus interest be entered and defendant requesting that judgment in amount of $1,295,208.01 plus interest be entered; and

[fol. 116] The Court having heard arguments by counsel for the respective parties; having received and considered their motions and briefs; and being of the opinion that, since the Connecticut proration statute applies to the residuary shares of the estate, the widow's trust, being itself exempt from federal estate taxes, should bear no part of such taxes (*The Second National Bank of New Haven* v. *United States,* 222 F. Supp. 446, 454 (D. Conn. 1963)); it is

Ordered that plaintiff's motion for entry of judgment be, and the same hereby is, granted; and it is further

Ordered that defendant's motion for entry of judgment be, and the same hereby is, denied; and it is further

Ordered that the Clerk of this Court be, and he hereby is, directed to enter judgment providing

(1) that plaintiff recover of defendant the sum of $1,485,293.86 with interest at the rate of 6% per annum from May 29, 1962, and

(2) that this Court shall retain jurisdiction of this action for the purpose of determining the amount of any deduction for Federal estate tax purposes to which plaintiff is entitled for attorneys' fees and expenses incurred in the prosecution of this action.

Dated at New Haven, Connecticut, this 2nd day of December, 1963.

William H. Timbers, United States District Judge.

[fol. 117]

IN THE UNITED STATES DISTRICT COURT

JUDGMENT—December 2, 1963

A motion by the plaintiff above named for partial summary judgment in its favor on the question of liability pursuant to Rule 56(c) of the Federal Rules of Civil Procedure having been duly brought on to be heard, and the Court having made an order thereon denying said motion on the question of the widow's allowance and granting said motion on the question of proration of federal estate taxes, it is hereby

Ordered, adjudged and decreed that the plaintiff recover of the defendant $1,485,293.86 with interest at the rate of 6% per annum from the 29th day of May, 1962; and it is hereby further

Ordered, adjudged and decreed that this Court retain jurisdiction of this action for the purpose of determining the amount of any deduction for federal estate tax purposes to which plaintiff is entitled for attorneys' fees and expenses incurred in the prosecution of this action.

Dated at New Haven, Connecticut, this 2nd day of December, 1963.

Gilbert C. Earl, Clerk, United States District Court.

[fol. 118]

IN THE UNITED STATES DISTRICT COURT

DEFENDANT'S NOTICE OF APPEAL—Filed January 24, 1964

Notice is hereby given that the United States of America, defendant above named, appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action of December 2, 1963.

Robert C. Zampano, United States Attorney;

Anthony G. Apicella, Assistant United States Attorney.

This is to certify that a copy of Notice of Appeal has been forwarded to counsel for plaintiff, Curtis K. Thompson, Esquire, 205 Church Street, New Haven, Connecticut, this 24th day of January, 1964.

Anthony G. Apicella, Assistant United States Attorney.

[fol. 119]

IN THE UNITED STATES DISTRICT COURT

PLAINTIFF'S NOTICE OF CROSS-APPEAL—
Filed January 27, 1964

Notice is hereby given that The Second National Bank of New Haven, Executor of the Will of Frederick F. Brewster, late of Hamden, deceased, plaintiff in the above en-

titled action, hereby cross-appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on December 2, 1963 insofar as said judgment denies to the plaintiff damages for failure of the defendant to allow as part of the marital deduction in computing the amount of the federal estate tax on said estate the amount of the allowance to the widow made by the Probate Court for the District of Hamden on February 2, 1959 and paid on March 13, 1959.

Dated: January 27, 1964

Curtiss K. Thompson, John H. Weir, Attorneys for Cross-Appellant, 205 Church Street, New Haven, Connecticut.

[fol. 120] This is to certify that copies of this Notice of Cross-Appeal have been delivered to the offices of the following:

Robert C. Zampano, Esquire, United States Attorney, Post Office Building, New Haven, Connecticut;

Anthony G. Apicella, Esquire, Assistant United States Attorney, Post Office Building, New Haven, Connecticut.

January 27, 1964

John H. Weir.

[fol. 121]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 89—September Term, 1964.

(Argued March 18, 1965)

Docket No. 28868

THE SECOND NATIONAL BANK OF NEW HAVEN, Executor of the Will of Frederick F. Brewster, late of Hamden, Deceased, Plaintiff-Appellee-Appellant,

—v.—

UNITED STATES OF AMERICA, Defendant-Appellant-Appellee.

Before:

MOORE, KAUFMAN and MARSHALL,*

Circuit Judges.

OPINION—September 28, 1965

Cross appeals by the United States of America, defendant and The Second National Bank of New Haven, Executor of the Will of Frederick F. Brewster, late of Hamden, Deceased, plaintiff from a judgment of the court, William H. Timbers, *Chief Judge,* District of Connecticut, entered upon a decision granting summary judgment in favor of defendant on the question of the widow's allowance and in favor of plaintiff on the question of the proration of estate taxes, adjudging that plaintiff recover $1,485,293.86 with [fol. 122] interest and retaining jurisdiction for further proceedings. 222 F. Supp. 446. Appeal by the Executor

* Judge Marshall heard oral argument and participated in the decision in this case, formally concurring therein prior to his becoming Solicitor General.

from the failure to include the widow's allowance as part of the marital deduction not argued, *Jackson* v. *United States*, 376 U. S. 503 (1964), conceded to be controlling.

Reversed.

Curtiss K. Thompson, New Haven, Conn. (John H. Weir, of counsel), for Plaintiff-Appellee-Appellant.

John B. Jones, Jr., attorney, Department of Justice, Washington, D. C. (Louis F. Oberdorfer, Assistant Attorney General, Lee A. Jackson, Robert N. Anderson, Timothy B. Dyk, Benjamin M. Parker, attorneys, Department of Justice, Washington, D. C., of counsel, Robert C. Zampano, United States Attorney, District of Connecticut, on the brief), for Defendant-Appellant-Appellee.

MOORE, *Circuit Judge*:

The Second National Bank of New Haven, Executor of the Will of Frederick F. Brewster (referred to as the executor* and the Bank), brought this suit to recover federal estate taxes in excess of $1,600,000 allegedly assessed erroneously and illegally against the estate and paid under protest. The facts are not in dispute.

Frederick F. Brewster, a resident of Connecticut, died on September 16, 1958. By will dated June 5, 1958, he made certain specific bequests and directed that "the rest, residue and remainder" be distributed: one-third "thereof" to the [fol. 123] Bank as trustee in trust to pay the income therefrom to his wife, Margaret, for life and upon her death to convey the principal to three of his children; and two-thirds to the trustee to be held in separate trusts for his grandchildren, the trusts to terminate at various times specified in the will. On July 1, 1958, by codicil undoubtedly designed to qualify his wife's one-third for the marital deduction, as

* An individual executor resigned.

authorized by section 2056 of the Internal Revenue Code of 1954, he modified the will to give her a power of appointment over the principal of her one-third; if not exercised, the principal was to go to his three children originally named. In all other respects, except one specific bequest, the will was expressly republished and confirmed.

The will in its first paragraph[1] makes specific provision for the payment "out of my estate" of "death taxes" by directing the executor to pay them along with debts and funeral expenses. The taxes are defined as such as "may legally be assessed upon or with respect to any property which is required to be included in my gross estate under the provisions of any death tax law." To make doubly certain that the beneficiaries not be charged with estate taxes prorated against their shares, the testator provided that: "The provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries of this will or the transferees of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate." The direction and intent [fol. 124] set forth in paragraph "ONE" would seem to be clear and unambiguous to the effect that taxes were to come out of his residual estate and that despite any contrary statute the testator specifically wished to avoid any proration.

When the federal estate tax return was filed, Margaret's one-third share of the residue was computed before the residue was reduced by federal taxes, thus placing the entire tax burden on the two-thirds share passing to the

[1] "ONE: I direct my executors hereinafter named to pay out of my estate my just debts and funeral expenses and any death taxes which may be legally assessed upon or with respect to any property which is required to be included in my gross estate under the provisions of any death tax law. The provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries of this will or the transferees of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate."

testator's grandchildren. Accordingly, the executor reported a gross estate of $13,201,347.91 from which it deducted specific bequests, debts and administration expenses, the marital deduction comprising Margaret's undiminished share of the residue augmented by a "widow's allowance" of $350,000 made by the Connecticut Probate Court for the District of Hamden but reduced by $281,752.70 of "other death taxes." A taxable estate of $8,392,892.80 was declared on which a tax liability of $4,028,613.85 was reported.

Upon audit, the District Director of Internal Revenue (the Director) disallowed the $350,000 widow's allowance as a part of the marital deduction (one-third, $116,666.67 was allowed because it would otherwise have passed to the marital trust) and decreased the marital trust from $3,630,243.95 to $1,682,846.59. The latter reduction was based upon the Director's construction of paragraph "ONE" of the will as requiring the deduction from the gross estate of all federal, state and state succession taxes before the marital trust of one-third of the residue could be computed. Thus, all the residuary legatees were required to share the tax burden equally. To arrive at his figure, he submitted an "explanation of items" showing an adjusted gross estate of $12,380,897.22 from which he deducted certain bequests, various state taxes and a federal estate tax ($5,108,442.48), leaving a residue of $5,048,539.76, one-third of which, $1,682,846.59, he allowed as the marital trust. Upon the basis [fol. 125] of this adjustment, the Director by 30-day letter asserted a tax deficiency of $1,336,468.40 which the executor paid. This suit for refund followed on the theory that Margaret's share should not have been diminished by federal taxes, thus increasing the marital deduction and eliminating the assessed deficiency.

After receipt of the 30-day letter, the executor in November 1961 applied to the Probate Court in Connecticut for a determination as to how, under Conn. Gen. Stat. sections 12-400, 401(a), 404, 405 (1964 Rev.), the federal estate tax on the residuary bequests should be prorated

between those bequests.[2] The Probate Court approved the executor's proposed proration on the theory that it could not say that under state law there was "a clear and un- [fol. 126] ambiguous direction against proration among shares of the residue; and such it must be if there is to be no proration in the residue [citing cases]."

Upon motion by the plaintiff-executor for summary judgment, the District Court held (1) that the widow's allowance of $350,000 did not qualify as part of the marital deduction; (2) that the Connecticut proration laws apply because there was no "clear and unambiguous direction" to the contrary; (3) that the federal court was not bound by the Probate Court's determination in virtually a non-adversary pro-

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[2] Section 12-401(a) is the most pertinent of these statutes and provides in part:

> "*Proration of estate taxes. Procedure.* (a) When it appears from any administration account, or in any appropriate proceeding in the probate court that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity has paid a death tax levied or assessed under the provisions of chapter 217, hereinafter called the Connecticut estate tax, or under the provisions of the United States internal revenue code or under any death tax law of the United States hereafter enacted, hereinafter called the federal estate tax, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except when a testator otherwise directs in his will or when, by written instrument executed inter vivos, direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such inter vivos instrument, shall, except as hereinafter provided in subsection (b), be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such proration shall be made in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate, except that, in making such proration, allowances shall be made for any exemptions granted by the act, imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate . . . "

ceeding; and (4) that the marital trust was not to be reduced by any portion of federal estate tax liability.

Upon appeal the Government asserts error in the trial court's conclusion that the language of paragraph "ONE" of the will is not a clear and unambiguous direction against proration.

The problem to be resolved is succinctly stated (in its brief) by the Executor:

> "... if the Connecticut proration statutes do not apply, as the United States contends, all of the federal estate tax is payable from the estate before the residuary is determined, the widow's trust of one-third of the residue bears one-third of the amount of the federal estate tax and the amount of the marital deduction is reduced by that one-third amount. On the other hand, if the Connecticut proration statutes do apply, as plaintiff contends, the amount of the widow's trust is determined before the payment of the federal estate tax, at least on the residue; that trust, being itself exempt from tax as part of the marital deduction, bears no part of such tax; and the marital deduction is the full amount of the property passing to the widow. Thus, the basic issue is whether or not the Connecticut proration statutes apply in this case."

[fol. 127] It would be difficult to conceive of a clearer direction expressing the thought that death taxes, together with debts and funeral expenses, were to be paid out of the estate. The first sentence of Article One ("I direct my executors to pay out my just debts and funeral expenses and any death taxes . . .") has been held in cases where similar language was construed not only to shift the tax burden to the residue as an expense of administration, *Starr* v. *Watrous*, 116 Conn. 448, 165 Atl. 459 (1933), but also as the equivalent of a direction against proration among the residuary legatees. *Crump* v. *Crump*, 20 Conn. Supp. 471, 140 A. 2d 143 (Super. Ct. 1957). The "inclusion of them

[taxes] in the same classification as debts, funeral expenses . . . " is an expression of "an intention that they should be paid out of the estate in the same way and from the same funds as these other charges." *Starr* v. *Watrous, supra,* 116 Conn. at , 165 Atl. at 460.

Any far-fetched doubt as to the testator's intent in the first sentence of paragraph "ONE" is quickly dispelled by the second sentence in which he specifically declares that "the provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries * * * shall be without effect in the settlement of my estate." The trial court conceded that "the first sentence shifts the tax burden to the residue"; but was of the opinion that "the clause in the second sentence of Article one referring to the ultimate payment of taxes by them [the beneficiaries]" created a conflict with the first sentence and, therefore, an ambiguity in the direction against proration.

There are two fallacies in the trial court's position. First is the assumption that the "beneficiaries" in the second sentence are intended as the residual legatees only and, second, is the assumption, built upon the first, that the residuary legatees "are not to be held for the 'ultimate payment' of [fol. 128] death taxes." From these assumptions, the court reaches the conclusion that, since "some legatees must pay the death taxes out of their share of the estate," "to direct that neither pre-residuary [in the first sentence] nor residuary legatees [in the second sentence] are to be liable for death taxes, although testator must have known that the taxes must come from one or the other of these sources, renders such directions ambiguous." 222 F. Supp. at 454-55. But such ambiguity results only from the court's assumptions—not from the language of the will. The testator was not directing that his beneficiaries were not to be affected in any way by the payment of death taxes. His very explicit treatment of the subject in the initial paragraph evidences his awareness of the necessity of their payment. The sentence deals with the possible provisions

of "any statute requiring the apportionment or proration of such taxes" or of [any statute requiring] "the ultimate payment of such taxes by them." The "them" refers to "the beneficiaries of this will or the transferees of such property." The words "ultimate payment" can refer only to the type of statute which might require ultimate payment on an apportioned basis. Such statute the testator declared was to be "without effect in the settlement of my estate." Thus, in summary, the testator specifically wished to have death taxes paid out of his estate but without proration. Once these were paid, the executor could undertake to comply with his remaining wishes. Ultimately there would be a residue. *A fortiori* without tax deductions from the pre-residuary bequests, the residue would be diminished by the federal estate tax and each of the three trusts equally diminished by one-third of that amount.

Nor can ambiguity be found in the testator's republication of his will to qualify the marital trust under section 2056. The trial court also found an ambiguity in the fact [fol. 129] that a direction against statutory proration was included in the original will although the marital trust was then not qualified as a deduction under section 2056 and was not insulated from the burden of federal estate taxes by the Connecticut proration statutes. The court reasoned that "to attribute to the testator a direction against proration where no proration was possible, would render uncertain what the testator 'did • • • mean by what he did say.'" 222 F. Supp. at 454. The modification in giving his wife a power of appointment over her one-third share does not bespeak any intention to alter his wishes expressed in paragraph "ONE" which was specifically republished and confirmed. Moreover, the will in any event would speak as of the date of death when proration under the Connecticut statutes presented a definite problem to be guarded against. *Union & New Haven Trust Co.* v. *Sullivan*, 142 Conn. 685, 116 A. 2d 908 (1955); *Mead* v. *Close*, 115 Conn. 443, 161 Atl. 799 (1932); *Travis* v. *Wolcottville School Soc'y*, 113

Conn. 618, 155 Atl. 904 (1931). With his attention focused on the consequences of the marital deduction change, the testator had ample opportunity to consider on republication any further special tax treatment for his wife's one-third share had he desired to do so. Thus, the will and codicil must be considered as "the expression of a single testamentary act." *Appeal of Shey*, 73 Conn. 122, 124, 46 Atl. 832 (1900). The reasoning in the opinion of the New York Court of Appeals in *In the Matter of Ellen W. Duryea*, 277 N. Y. 310, 317, 14 N. E. 2d 369, 371 (1938), is persuasive, the court saying:

> "It is clear that it was the intent of the testatrix to direct payment of all gifts, legacies and devises provided for under her will free from and without deduction on account of taxes properly assessed on account of [fol. 130] such gifts, legacies and devises, and that the taxes thereon should be paid out of her residuary estate. It must be assumed, since she affirmed that part of her original will in the codicil by which she gave the powers of appointment, that it was her intention that the taxes assessed on gifts made by her under those powers should likewise be payable out of her residuary estate."

The courts would indeed be making a new will for the testator if paragraph "ONE" were to be interpreted as a direction that federal estate taxes not be paid "out of my estate" but that they be borne solely by the "two-thirds" trusts for the grandchildren. The codicil shows a desire to qualify one-third of the residue as a marital deduction. It does not disclose an intention to have this part of the residue in effect tax free and grossly disproportionate to the other two-thirds. That which the testator did not choose to do during his lifetime the courts should not do after his death.

The executor and the Government have made extensive arguments as to the effect of the Connecticut Probate

Court's adjudication that the Connecticut proration statutes applied. The trial court after carefully considering the arguments and the many relevant decisions concluded that "the decrees of the Connecticut Probate Court—which is not a court of record and most of the judges of which are laymen, not lawyers—under no circumstances can be construed as binding and conclusive upon a federal court in construing and applying the federal revenue laws." 222 F. Supp. at 457. This court is in accord with the trial court's conclusion as to the effect of the state decree, see *Estate of Hamilton H. Peyton* v. *Commissioner*, 323 F. 2d 438 (8th Cir. 1963), since under Connecticut law the Probate [fol. 131] Court's decisions are not binding on the state's higher courts, *Heiser* v. *Morgan Guaranty Trust Co.*, 150 Conn. 563, 192 A. 2d 44 (1963), and are even subject to collateral attack in another probate district, *Culver's Appeal from Probate*, 48 Conn. 165, 172-174 (1880). Under the circumstances, it was unnecessary "to make a finding as to whether the proceedings in the Probate Court were collusive or non-adversary in nature" and the court properly refrained from so doing.

The question of the District Court's failure to include the $350,000 widow's allowance is no longer before this court because the executor concedes that the Supreme Court's decision in *Jackson* v. *United States*, 376 U. S. 503 (1964), handed down after the trial court's decision and before argument of this appeal, is controlling. In that decision, the Supreme Court held, as did the trial court here, that the allowance was a terminable interest and, therefore, did not qualify for the marital deduction.

Nor is the question of the proper computation of the judgment before us in view of our conclusion that the proration statutes do not apply.

As the Government states (in brief), "In this unusually complicated estate tax case the sole issue is the amount of the marital deduction allowed by Section 2056 of the Internal Revenue Code of 1954 * * *." The intricate alge-

braic formulae and the arithmetical backing and filling required to compute the tax attest to this complexity. See, e.g., 1 CCH Fed. Est. & Gift Tax Rep., ¶2090, at 3056-3087, dealing with the valuation of the marital deduction.

By this decision construing paragraph "ONE" to direct that the proration laws of Connecticut do not apply, we do not intend to foreclose the executor or the Government [fol. 132] from making such adjustments or revisions in the federal estate tax as may be necessary to give full advantage to the estate of the marital deduction as it may be properly computed in accordance with such construction.

The judgment of the District Court is reversed.

[fol. 133]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE SECOND NATIONAL BANK OF NEW HAVEN, Executor of the Will of Frederick F. Brewster, late of Hamden, deceased, Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, Defendant-Appellant.

JUDGMENT—September 28, 1965

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk.

[fol. 153]

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—March 21, 1966

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 157]

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Present:

Hon. J. Edward Lumbard, Chief Judge, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. Robert P. Anderson, Hon. Wilfred Feinberg, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING IN BANC—March 21, 1966

A petition for a rehearing in banc having been filed herein by counsel for the plaintiff-appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 159] Clerk's Certificate (omitted in printing).

[fol. 160]

SUPREME COURT OF THE UNITED STATES

No. 240—October Term, 1966

THE SECOND NATIONAL BANK OF NEW HAVEN, etc., Petitioner,

v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—December 5, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.
FILED
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted] 840

THE SECOND NATIONAL BANK OF NEW HAVEN, EXECUTOR OF THE WILL OF FREDERICK F. BREWSTER, LATE OF HAMDEN, DECEASED,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

OCTOBER TERM, 1965

No.

THE SECOND NATIONAL BANK OF NEW HAVEN, EXECUTOR OF THE WILL OF FREDERICK F. BREWSTER, LATE OF HAMDEN, DECEASED,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case.

OPINIONS BELOW

The opinion of the District Court for the District of Connecticut is reported at 222 F. Supp. 446 and is also printed in the record (pp. 87a-111a).

The opinion of the Court of Appeals for the Second Circuit is reported at 351 F.2d 489 and is also printed in the record at pages 121a-132a and in annexed appendix. (pp. 2a-14a)

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was made and entered on September 28, 1965. (App. p. 15a) The petition of The Second National Bank of New Haven as Executor aforesaid for a rehearing (R. p. 135a) and its suggestion for rehearing in banc were denied on March 21, 1966. (R. pp. 153a, 157a) The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Connecticut statutes prescribe that federal and Connecticut estate taxes paid by a decedent's estate are to be equitably prorated among the persons interested in it, *i.e.* donees of taxable inter vivos transfers, pecuniary and specific legatees and recipients of the residue. If a particular gift does not generate any estate taxes because of the marital deduction or its charitable character, no estate taxes can be prorated against it. The statute applies to every estate paying such taxes, unless the testator in his will has clearly and unambiguously directed otherwise.

In proration proceedings in this decedent's estate, the Probate Court ruled that for lack of a clear and unambiguous direction to the contrary, estate taxes generated by the residue should be apportioned between residuary gifts and that hence the widow's one-third share of the residue, which qualified

for the marital deduction and tax exemption should have no estate taxes charged against it. The present case seeks a refund of federal estate taxes.

The two questions presented are:

(1) Whether estate taxes should be prorated as between the residuary shares because the testator failed, under the standards established by the Supreme Court of Connecticut, to clearly and unambiguously direct otherwise?

(2) Whether the decree of the Probate Court determining that the Connecticut proration statute was applicable to the residuary estate and that estate taxes must therefore be prorated between the residuary shares was conclusive in assessing federal estate taxes?

STATUTES INVOLVED

The pertinent portions of the Internal Revenue Code of 1954, Section 2056 (26 U.S.C. 1958 ed. Sec. 2056) and Chapter 218 of the General Statutes of Connecticut, Section 12-400, Section 12-405 entitled *Proration of Federal and State Estate Taxes* (General Statutes of Connecticut, Volume II, Revision of 1958, as amended) are set forth in the annexed appendix. (pp. 19a-22a)

STATEMENT OF THE CASE

Petitioner is the sole executor of the will of Frederick F. Brewster, a resident of Connecticut, who died on September 16, 1958. The decedent's will and a codicil thereto were admitted to probate by the Probate Court for the District of

Hamden, Connecticut, on October 6, 1958. The will was originally executed on June 5, 1958. Article One provided:

> "ONE: I direct my executors hereinafter named to pay out of my estate my just debts and funeral expenses and any death taxes which may be legally assessed upon or with respect to any property which is required to be included in my gross estate under the provisions of any death tax law. The provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries of this will or the transferees of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate."

The remainder of the will provided certain pecuniary or specific bequests to his wife and others and left the residue in trust. In Article Nine of the will the testator stipulated that one-third of the residue was to be held in trust during the life of his wife, Margaret F. Brewster, and the income paid to her. Upon her death the trust was to terminate, and the corpus was to be paid in equal shares to three children, or their issue. The other two-thirds of the residue was to be held in trust for the benefit of all the decedent's grandchildren living upon his death. (R. pp. 14a-25a)

On July 1, 1958, within a month of the execution of his original will, the decedent executed a codicil thereto by which he altered the provisions of his original will in two respects. (R. pp. 27a-29a) First, he amended Article Two of the will in which he had provided that certain expenses that might arise in connection with certain charitable gifts were to be paid from the principal of the widow's trust. (R. p. 16a) The codicil deleted the provisions for payment from the widow's trust and instead created a separate trust with the income and principal to be used to meet such expenses. The second alteration in the will related to the widow's trust. The decedent specified that in addition to the income of the trust for life,

his wife was to receive a general testamentary power of appointment over the corpus of the trust (i.e., one-third of the residue). In default of appointment, the corpus of the trust was to be paid over, as provided in the original will, to three of his children, or their issue. By this change, the decedent qualified the widow's trust for the marital deduction provided by Section 2056 of the Internal Revenue Code of 1954 and tax exemption. The testator stated in the codicil that "In all other respects I hereby republish and confirm my said will." (R. pp. 27a-29a)

On December 16, 1958, the petitioner and another executor, who later resigned, filed a federal estate tax return reporting an estate tax liability of $4,028,613.85 based upon a gross estate of $13,201,347.90 and a taxable estate of $8,392,892.80. (R. pp. 87a-88a) The return claimed as part of the marital deduction the corpus of the widow's residuary trust. This was computed as one-third of the residue before the payment of estate taxes attributable to residuary properties. In essence the widow's allowance, the pre-residuary legacies and taxes thereon, the debts and administration expenses were deducted from the total probate estate. One-third of the remainder was allocated to the widow's trust which was then reduced by the state succession taxes levied against it. (R. p. 61a)

On October 18, 1961, following an audit of the estate tax return, the District Director of Internal Revenue forwarded to the executors a so-called "30-day letter"[1] showing a defi-

[1] Such a letter is an intermediate step preceding the issuance of a "90-day letter" or statutory notice of deficiency. The letter informs the taxpayer of certain rights of appeal within the Internal Revenue Service. The function of a 30-day letter is described in Section 601.105(d) of Statement of Procedural Rules (Internal Revenue Service) (26 C.F.R., Sec. 601.105 (d)).

ciency due in the amount of $1,336,468.40. This deficiency resulted principally from two determinations made by the District Director: the disallowance of the widow's allowance as part of the marital deduciton and the reduction of the marital deduction for the widow's trust from $3,630,243.95 to $1,682,-846.59. The latter adjustment was based on the District Director's determination that estate taxes should not be prorated between residuary gifts and that the widow's trust should receive one-third of the residuary estate computed after the payment of all federal and state death taxes, including the estate taxes generated by the residuary properties. (R. pp. 67, 69, 71, 88-89)

Upon filing the federal estate tax return in December, 1959, the executors had paid the estate tax reported due, *i.e.* $4,-028,613.85. (R. pp. 54a, 55a, 59a) On November 10, 1961 the executors filed an application in the Probate Court to determine the proration of the federal estate taxes paid. Since all such taxes attributable to non-residuary gifts were recognized as payable out of the residue by express direction of the testator, proration was possible only with respect to residuary shares. (R. pp. 31a-42a) The total federal estate tax attributable to the residuary properties and subject to proration was $3,832,550.45.

Notice of the application and hearing thereon was given, inter alia, to the decedent's widow, two adult grandchildren, beneficiaries of residuary trusts, the guardian-ad-litem for the seven minor grandchildren also beneficiaries of residuary trusts, and the District Director of Internal Revenue at Hartford. (R. pp. 38-39, 78, 79, 80, 89) The District Director was also furnished with a copy of the executor's application and computation of the proposed proration they deemed necessary.

The guardian-ad-litem, an attorney-at-law, filed his report under oath stating that there were no legal objections to the proration of the federal estate tax as set forth in such application and in his letter transmitting the report to the Judge of Probate, he stated the grounds for his opinion. (R. pp. 75a-78a)

Neither of the adult grandchildren nor the District Director of Internal Revenue appeared at the hearing or made their positions known to the Probate Court. Subsequent to the hearing and on December 26, 1961 the Probate Court filed a memorandum of decision approving the executors' proposed proration and entered a decree in which it:

> "ORDERED, that the federal estate tax be prorated in the manner and in the amounts set forth in said application and that said Executors are authorized, empowered and directed to charge the prorated amounts against the persons against whom the tax is so prorated as set forth in said application."

(R. pp. 78a-81a)

Thereafter the Commissioner determined and assessed a deficiency in the amount of $1,333,194.35 tax plus $195,285.58 interest, ruling that the widow's allowance did not qualify for the marital deduction and finding that the amount of the marital trust was as stated in the 30-day letter. (R. pp. 48, 49) The plaintiff paid the deficiency and commenced this timely suit for refund in the amount of $1,600,000 plus interest in the United States District Court for the District of Connecticut. (R. pp. 12, 89)

On the executor's motion for summary judgment on the issue of liability in the district court (R. p. 90a) the latter held:

(1) That the widow's allowance did not qualify for the marital deduction. (In the Court of Appeals the executor con-

ceded its position on this issue so that it is not now involved in the case).

(2) That the testator had not clearly and unambiguously directed against the proration of estate taxes between residuary gifts and hence the Connecticut apportionment statute was applicable in that area.

(3) That the decree of the probate court relating to proration of estate taxes was not conclusive upon the federal government.

The United States then moved that, under the District Court's decision, judgment be entered against it in the amount of $1,295,208.01 plus interest. (R. p. 112) Plaintiff, however, moved for judgment in the amount of $1,485,293.86 plus interest. (R. pp. 113-115) After a hearing the District Court, without making further findings of fact, entered judgment against the United States for $1,485,293.86 plus interest as requested by the plaintiff. (R. pp. 115-117)

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the Court of Appeals:

(a) has decided important state questions in a way in conflict with applicable state law;

(b) has decided a federal question in a way in conflict with applicable decisions of this Court;

(c) has rendered a decision in conflict with the decisions of other courts of appeals on the same matter.

ARGUMENT

In Support of Reason (a)

An apportionment statute modeled after that of New York was first enacted in Connecticut in 1945. In 1949 the Supreme Court of Connecticut first had occasion to consider this statute in *McLaughlin* vs. *Green,* 136 Conn. 138. Out of this case came the principle that apportionment pursuant to the statute is the rule to which exception is allowed only if there is a clear and unambiguous direction against it. Sometimes the word "specific" is used instead of "clear". The Connecticut Supreme Court drew this principle from *Matter of Mills,* 272 App. Div. 229, 233, 70 N.Y.S. 2d 746, quoting from the opinion in the latter case with approval. In subsequent decisions the principle became firmly established in Connecticut jurisprudence. See *Jerome* vs. *Jerome,* (1952), 139 Conn. 285, 93 A.2d 139; *New York Trust Co.* vs. *Doubleday,* (1956), 144 Conn. 134, 128 A.2d 192; *Guaranty Trust Co.* vs. *New York City Cancer Committee,* (1958), 145 Conn. 542, 144 A.2d 535; *Morgan Guaranty Trust Co.* vs. *Huntington,* (1962), 149 Conn. 331, 179 A.2d 604.

Also established in the last three of the decisions cited was the rule that a direction to pay taxes out of the residuary estate, such as is found in Mr. Brewster's will is not a sufficient direction against proration among residuary gifts. Thus in *New York Trust Co.* vs. *Doubleday, supra,* the court said at page 141:

> "• • • At first blush, this language might seem to be sufficiently broad and inclusive to cover gifts of the residue itself as well as those resulting from specific devises and legacies. Upon reflection, however, there arises some doubt that this was the testator's intention. Since a doubt

> exists, the tax clause lacks the clarity necessary to make the proration statute inoperative as to the residuary gifts. Whatever may have been his unexpressed intention, *the testator neglected to speak clearly upon the question of proration as it applies to the residuary gifts. The directive in the will that all estate taxes be paid from the residue is not a directive against the prorating of estate taxes among residuary gifts.*" (emphasis added)

Guaranty Trust Co. vs. *New York City Cancer Committee, supra,* and *Morgan Guaranty Trust Co.* vs. *Huntington, supra,* are to the same effect.

In the present case the problem relates not to estate taxes on inter vivos gifts or non-residuary legacies, all of which were clearly stated to be payable out of the residue, but only to apportionment of estate taxes among the residuary shares. The third of the residue given to the widow was made to qualify for the marital deduction and to become tax exempt by the codicil; the balance of the residue passed into several trusts for the decedent's grandchildren and remained taxable. If the widow's share was to be kept free of the burden of estate taxes, the will had to speak clearly and unambiguously not about the preresiduary gifts, but about the residuary gifts and the estate taxes generated by them. Clarity and specificity were necessary under the authorities cited.

To the guardian ad litem, the Probate Court and the District Court doubt about the testator's intent arose out of the phrase "beneficiaries of this will" found in the second sentence of Article One. (R. p. 140) The phrase obviously included all beneficiaries, residuary as well as non-residuary. Thus, literally the first sentence of Article One directed the payment of all death taxes out of the residue while the second sentence prohibited the payment of them by residuary beneficiaries.

That is what the words of the will said. The uncertainty thereby created about the decedent's intent led the guardian and the two courts mentioned to conclude that the direction about proration was not clear and unambiguous, and in conformity with the Connecticut decisions cited above, each decided that the proration statute must apply within the residue. The guardian's report and the probate court decision appear in the record at pages 75a-81a.

Further, when the will was made, the direction not to apply the proration statute was wholly inoperative within the residue. The residuary gifts were equally taxable and no reason existed for treating one differently than another. The taxes on them necessarily must be paid out of the residue and proration between them in proportion to the size of each gift was automatic. Article One was not necessary to accomplish this result. But upon the codicil being executed, rendering the widow's third tax exempt, the underlying condition was changed. A question arose whether by the codicil, the testator intended to enlarge the effect of Article One and thereby deny his widow the full benefit of the tax exemption he manifestly desired her to have, or whether Article One still remained ineffective in the residue.

In testing the legitmacy of these doubts the guardian and the probate and district court had the benefit of the thinking of the New York Court of Appeals in *Matter of Pepper*, (1954), 307 N.Y. 242, 120 N.E. 2d 807, a parallel case in which the court said that the "inherent contradiction" such as has been pointed out in Article One rendered the whole tax clause "meaningless." Unquestionably they believed the Supreme Court in Connecticut would follow this authority. The tenor of the decisions of the New York and Connecticut courts in this

field is the same.[2] The district court also had support from the New York Court of Appeals in another strikingly parallel case, *Matter of Shubert*, (1962), 10 N.Y. 2d 461, 180 N.E. 2d 13, which had not been decided when the Probate Court acted. There a codicil had altered certain residuary bequests to make them charitable and tax exempt and also republished the will without changing the tax clause. The same problem arose as in the instant case. The New York Court settled it by saying it did not perceive how a tax clause could be read as an express direction to accomplish something totally unnecessary when it was drafted.

Thus the doubts apparent to the guardian and the probate court and the district court were real and not far fetched. The Court of Appeals sought to avoid them by "construing" the will. Near the end of its decision, the Court epitomizes it as one "construing paragraph 'One' to direct that the proration laws of Connecticut do not apply." This aptly describes the opinion which contains much argumentation and speculative reasoning typical of the process of construction; but it disregards Connecticut law, which by its insistence upon a "clear and unambiguous directive" forbids the use of surmise as a substitute.

In an effort to dispel the doubt resulting from the codicil making the widow's share tax exempt, the Court of Appeals reasons that the will and codicil were jointly a single testamentary act which spoke as of the date when proration within the residue had become a definite problem. In substance it is saying that by reason of republication of the will, we must dis-

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[2] The New York law respecting tax apportionment is essentially the same as the law of Connecticut. *Matter of Huntington*, (App. Div. 1st Dept. — 1962) 14 A.D. 2d 312.

regard the historical development of the will and codicil in determining the testator's intent and indulge the fiction that the tax clause was written at the date of the codicil and determine the testator's intent as though that had been the fact. On this proposition turns the whole effort of the Court of Appeals to eliminate the doubt mentioned. If wrong its whole "construction" of Article One collapses. In stating this proposition, the Court of Appeals disregarded *Matter of Shubert, supra,* where the very same situation existed, but more importantly perhaps here, it ignored the only truly pertinent Connecticut authorities. The proposition stated is wholly wrong under Connecticut law. In *First National Bank* vs. *Baker,* (1938), 124 Conn. 577, 1 A.2d 283, the Supreme Court said at page 583:

> "• • • That the republication of the will in the codicil is in effect the making of a new will, with such changes in it as are contained in the codicil, as of the date of the codicil, has many times been held. • • • That does not mean, however, that in determining the construction of the instrument the development of the testamentary intent through the will and the codicils and the circumstances surrounding their execution are to be disregarded and the whole will read as though it were all originally made at the date of the codicil. 'From a will and its several codicils, like a statute with its later amendments, the maker's full intention is to be gathered.'"

After examining the will and codicil, the court concluded:

> "• • • The sole purpose of the last codicil was evidently to add a co-executor and there is no suggestion of an intent otherwise to change the provisions of the will or prior codicils. • • •"

See also: *Colt* vs. *Colt,* (1865), 32 Conn. 422, 447; *Griffith* vs. *Adams,* (1927), 106 Conn. 19.

Clearly a Connecticut court would read and understand the tax clause as originally written and then determine whether the codicil expressed an intention to change its effect. There is no sanction in the law of Connecticut for any other approach.

The Court of Appeals sought to buttress its conclusion about this matter by saying that in any event, that is, if the law was otherwise, the will would speak as of the date of death and at that time "proration was a problem to be guarded against." (R. p. 129a) The cases cited by the Court are inapposite and the court misconceives the meaning of rule and the law of Connecticut. This becomes abundantly plain if *Union & New Haven Trust Company* vs. *Sullivan*, 142 Conn. 685, the most recent of cases cited by the Court, be briefly considered. There, one of the questions reserved for the Supreme Court concerned the meaning and effect of a tax clause and whether it authorized the payment of certain federal estate taxes. It did not involve proration. The Supreme Court said at page 691:

> "The answers to these questions require that we find and effectuate John Moran's intent with respect to the payment of this tax. We look to the will as an entirety and examine the particular words and language used in the light of the circumstances under which they were written. *Chase National Bank* vs. *Guthrie*, 139 Conn. 178, 182, 90 A.2d 643. • • •"

A more recent statement of the same rule is found in *Connecticut Bank & Trust Company* vs. *Lyman*, (1961), 148 Conn. 273 where the Supreme Court said at page 278:

> "On the other hand, we cannot rewrite a will or a trust instrument. The expressed intent must control, although this is to be determined from reading the instrument as a whole in the light of the circumstances surrounding the

testator or settlor when the instrument was executed, including the condition of his estate, his relations to his family and beneficiaries, and their situation and condition. 'The construing court will put itself as far as possible in the position of the . . . (settlor), in the effort to construe . . . (any) uncertain language used by him in such a way as shall, conformably to the language, give force and effect to his intention.' *Hoops* vs. *Stephan*, 131 Conn. 138, 143, 38 A.2d 588. But '(t)he quest is to determine the meaning of what the . . . (settlor) said and not speculate upon what he meant to say.' *Chase National Bank* vs. *Guthrie*, 139 Conn. 178, 182, 90 A.2d 643; *First National Bank & Trust Co.* vs. *Parish of St. Thomas' Church*, 141 Conn. 489, 497, 107 A.2d 246."

The authorities cited in this section of the argument are not mentioned in the opinion of the Court of Appeals with the single exception of *Union & New Haven Trust Co.* vs. *Sullivan, supra*. The decision of the Court of Appeals is in conflict with all of them. Thus that court has decided several state questions in a way that is in conflict with state law. Its basic error was in deciding that the state apportionment statute may be made inoperative by something less than the specific and unambiguous directive the Connecticut Supreme Court requires. In the process of "construing" the will and codicil it reached conclusions as to the manner of doing it and the effect of republication of the will by the codicil that are also in conflict with the law of Connecticut.

The importance of these questions in the jurisprudence of Connecticut is obvious. When apportionment or the construction of a will is involved, substantial sums of money are generally at stake. But their usual importance is enhanced when they arise in a proceeding that may have a bearing on the assessment of federal taxes, for then their effect is wider and

heavier. It is imperative that a Probate Court have a stable body of state law with which to exercise the jurisdiction given to it over apportionment and to make the determinations of property rights affecting the assessment of federal estate taxes. This is evident if we look beneath the surface of this case. The Probate Court's decree apportioned estate taxes amounting to $3,832,550.45 wholly against the grandchildren's shares. (R. p. 39a) The decree which was passed after proper notice to all interested parties, including the Internal Revenue Service, cannot now be set aside and no appeal now lies from it. (See *Gill* vs. *Bromley*, 107 Conn. 281 and General Statutes of Connecticut, Sections 45-4, 45-288, 289.) The residue of the estate must be divided and distributed in conformity with it. Since the decree was passed, a deficiency in federal estate taxes was assessed for $1,333,194.45 and was paid and the Court of Appeals has ruled that no part of it is refundable. If the case were to end here, the matter of prorating the additional federal estate taxes paid would have to be submitted to the Probate Court. The latter might well be expected to adhere to its earlier decree. In such case, the additional taxes which are attributable solely to the Court of Appeals having a different concept of Connecticut law would be charged to the grandchildren. This would be a manifestly unfair result.

In Support of Reason (b)

There is a line of decisions of this court uniformly holding that an adjudication of property rights by a state court of competent jurisdiction has a binding effect when federal taxes are being computed. They are:

Uterhart vs. *United States*, (1916), 240 U.S. 598;
Freuler vs. *Helvering*, (1933), 291 U.S. 35;

Blair vs. *Commissioner of Internal Revenue*, (1937), 300 U.S. 5;
Riggs vs. *Del Drago*, (1942), 317 U.S. 95.

In the latter case this court said at pages 97 and 98 that Congress intended that the applicable state law as to the devolution of property should govern the ultimate impact of the federal estate tax.

The Connecticut proration statute manifestly affects the devolution of property and these property rights. The computation of the federal estate tax was a federal question the Court of Appeals was called upon to decide, but in doing so, it was required by decisions of this court to recognize the controlling effect of state law in determining the property rights involved. In failing to do that, the Court of Appeals decided a federal question in a way in conflict with the applicable decisions of this court which we have cited above.

In Support of Reason (c)

The second question which this petition presents for review is whether the probate decree requiring proration of estate taxes among the residuary shares is conclusive in assessing federal estate taxes. Both the District Court and the Court of Appeals held that it was not conclusive and that this was so, even if the probate proceedings were adversary and not collusive in character.

So much of the decision is in conflict with decisions of the Courts of Appeals in the Third, Fourth, Fifth, Sixth and Eighth Circuits in the cases cited below:

Gallagher vs. *Smith*, (C.A. 3, 1955), 223 F.2d 218;
Estate of E. V. Babcock vs. *Commissioner*, (C.A. 3, 1956); 234 F.2d 837;

Estate of I. G. Darlington vs. *Commissioner*, (C.A. 3, 1962), 302 F.2d 693;

Pitts vs. *Hamrick*, (C.A. 4, 1955), 228 F.2d 486;

United States vs. *Estate of Stephen F. Farish, Jr.*, (April 26, 1966 — C.A. 5, 5th);

Goodwin's Estate vs. *Commissioner*, (C.A. 6, 1953), 201 F.2d 576;

Eisenmenger vs. *Commissioner* (1944 — C.A. 8), 145 F.2d 103;

Estate of H. H. Peyton vs. *Commissioner*, (1963 — C.A. 8), 323 F.2d 438.

The view of the Third Circuit is made abundantly plain in its latest decision *Estate of I. G. Darlington* vs. *Commissioner, supra.* The decedent bequeathed half of his residuary estate to certain charities and the executors elected to treat the state inheritance taxes on these bequests as a deduction from the gross estate rather than as a credit against the tax in computing federal estate taxes. This is permissible under the Revenue Code if the resulting decrease in federal estate taxes inures only to the benefit of the charity. After appealing to the Tax Court from a deficiency asserted in federal estate taxes, the executors brought a petition in the Orphans' Court of the state, to determine whether the resulting decrease in federal estate taxes would inure solely to the benefit of the charities. At page 694, the Court of Appeals for the Third Circuit said:

> "Whether an adjudication by an appropriate state court of a question of state law on which federal tax consequences are made to turn is to settle that question in the administration of a decedent's estate has several times been before this Court. We have three times held that, if federal law makes federal tax treatment depend, without further qualifiaction, upon who has what rights in an es-

tate under state law, a state court's adjudication which is final in its effect upon those rights must also be taken as final as to the tax matters which depend upon those rights. See *Beecher* vs. *United States*, 280 F.2d 202 (3d Cir. 1960); *Estate of Babcock* vs. *Commissioner*, 234 F.2d 837 (3d Cir. 1956); *Gallagher* vs. *Smith*, 223 F.2d 218, esp. at 222-223 (3d Cir. 1955) (Maris, J., for the Court *en banc*).

We have also held squarely, in two of the three cases cited above, *Beecher* and *Gallagher*, that in order for the state court to settle conclusively the property question under state law and by that to fix the tax consequences under federal law, it is not necessary that the adjudication be the result of a contest in which one party says yes and another no. Other circuits have applied the same rule. *Eisenmenger* vs. *Commissioner*, 145 F.2d 103 (8th Cir. 1944); *Bullard* vs. *Commissioner*, 90 F.2d 144 (7th Cir. 1937), *rev'd* on other grounds *sub nom. Helvering* vs. *Bullard*, 303 U.S. 297, 58 S. Ct. 565, 82 L. Ed. 852 (1938). We have, of course, made allowances for collusive proceedings or 'consent decrees.' As is said by Judge Maris in *Gallagher* v. *Smith*, *supra*, 223 F.2d at 225: 'It is clear • • • that a state judgment obtained by collusion to defeat a federal tax need not be given conclusive effect in a suit in a federal court involving that tax.'

There is not the slightest indication of a collusive arrangement here. All parties were summoned; the matter was presented in open court at a regular session thereof. Because the petitioners' request did not develop into a fight between the parties interested in the estate does not make the adjudication any less conclusive. We think it pretty clear that if anybody changes his mind concerning the result reached in the state adjudication he will have a

bad time trying to avoid the effect of the Delaware County Orphans' Court's decision."

Pitts vs. *Hamrick, supra,* involved an intestate estate in South Carolina where there was no apportionment statute. One-third of the estate passed to the widow and two-thirds to children. The Probate Court in reliance only on equitable principles decided that the widow's third should be computed without deduction on account of estate taxes. The Supreme Court of South Carolina had not passed on the question. The Court of Appeals for the Fourth Circuit said *inter alia* at page 489:

"The question here is whether the one-third of the estate belonging to the widow after deduction of debts and expenses of administration, but without deduction of any portion of the federal estate tax, should be taken as a deduction under the statute, or whether the share of the widow to be deducted should first be diminished by a portion of the federal estate tax."

and at page 490:

"Whatever be the general law of South Carolina with respect to the matter, however, the decision of the probate court, which has not been appealed from, has settled the law, so far as this estate is concerned, and has vested in the widow her one-third free and clear of federal estate taxes. There is no showing that it was entered as a result of collusion or fraud or in a non adversary proceeding. Its effect was not merely to free the widow's share of responsibility for estate tax but to direct that this tax be paid from other shares. In other words, it fixed the amount of the widow's share of the estate; and whether this was done erroneously or in accordance with law, the amount of her share has been fixed thereby and the shares

of other distributees have been decreased accordingly. As the amount which the widow will thus receive does not exceed one-half of the adjusted gross estate, and as she receives it under the law of the state by decree of one of its courts, the estate is entitled to deduct it in computing the federal estate tax. Action of the probate court, even if erroneous, is valid unless reversed. * * *"

In *United States* vs. *Estate of Stephen P. Farish, Jr., supra,* a declaratory judgment, interpreting certain trust instruments, had been obtained in a Texan Court. This adjudication of property rights was held to be conclusive in a federal estate tax case by the Court of Appeals for the Fifth Circuit.

In *Goodwin's Estate* vs. *Commissioner, supra,* the Court of Appeals for the Sixth Circuit had before it an appeal from the Tax Court in a federal estate tax case. It turned on the validity of certain substantial claims filed by the three daughters of the decedent. The widow, the administratrix of the estate, thought the claims legitimate, but because of her circumstances moved the Probate Court to determine them. The claims were not actively opposed and the Probate Court allowed them. The Court of Appeals gave controlling effect to the decision of the Probate Court.

In *Eisenmenger* vs. *Commissioner, supra,* a Minnesota state court had construed a trust instrument and held that a beneficiary had no interest in certain dividends received by the trust. The Eighth Circuit held this adjudication of property rights to be binding on the Tax Court and itself in deciding the federal income tax liability of the beneficiary. In *Estate of H. H. Peyton* vs. *Commissioner, supra,* the Eighth Circuit again recognized the general principle but considered the probate court decision to have been obtained in a collusive proceeding.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

JOHN H. WEIR,
CURTISS K. THOMPSON,
Attorneys for Petitioner.

on the question of the proration of estate taxes, adjudging that plaintiff recover $1,485,293.86 with interest and retaining jurisdiction for further proceedings. 222 F. Supp. 446. Appeal by the Executor from the failure to include the widow's allowance as part of the marital deduction not argued, *Jackson* vs. *United States,* 376 U.S. 503 (1964), conceded to be controlling.

Reversed.

CURTISS K. THOMPSON, New Haven, Conn. (John H. Weir, of counsel), *for Plaintiff-Appellee-Appellant.*

JOHN B. JONES, JR., attorney, Department of Justice, Washington, D.C. (Louis F. Oberdorfer, Assistant Attorney General, Lee A. Jackson, Robert N. Anderson, Timothy B. Dyk, Benjamin N. Parker, attorneys, Department of Justice, Washington, D.C., of counsel, Robert C. Zampano, United States Attorney, District of Connecticut, on the brief), *for Defendant - Appellant - Appellee.*

MOORE, *Circuit Judge:*

The Second National Bank of New Haven, Executor of the Will of Frederick F. Brewster (referred to as the executor * and the Bank), brought this suit to recover federal estate taxes in excess of $1,600,000 allegedly assessed erroneously and illegally against the estate and paid under protest. The facts are not in dispute.

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* An individual executor resigned.

Frederick F. Brewster, a resident of Connecticut, died on September 16, 1958. By will dated June 5, 1958, he made certain specific bequests and directed that "the rest, residue and remainder" be distributed: one-third "thereof" to the Bank as trustee in trust to pay the income therefrom to his wife, Margaret, for life and upon her death to convey the principal to three of his children; and two-thirds to the trustee to be held in separate trusts for his grandchildren, the trusts to terminate at various times specified in the will. On July 1, 1958, by codicil undoubtedly designed to qualify his wife's one-third for the marital deduction, as authorized by section 2056 of the Internal Revenue Code of 1954, he modified the will to give her a power of appointment over the principal of her one-third; if not exercised, the principal was to go to his three children originally named. In all other respects, except one specific bequest, the will was expressly republished and confirmed.

The will in its first paragraph [1] makes specific provision for the payment "out of my estate" of "death taxes" by directing the executor to pay them along with debts and funeral expenses. The taxes are defined as such as "may legally be assessed upon or with respect to any property which is required to be included in my gross estate under the provisions of any

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[1] "ONE: I direct my executors hereinafter named to pay out of my estate my just debts and funeral expenses and any death taxes which may be legally assessed upon or with respect to any property which is required to be included in my gross estate under the provisions of any death tax law. The provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries of this will or the transferees of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate."

death tax law." To make doubly certain that the beneficiaries not be charged with estate taxes prorated against their shares, the testator provided that: "The provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries of this will or the transferees of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate." The direction and intent set forth in paragraph "ONE" would seem to be clear and unambiguous to the effect that taxes were to come out of his residual estate and that despite any contrary statute the testator specifically wished to avoid any proration.

When the federal estate tax return was filed, Margaret's one-third share of the residue was computed before the residue was reduced by federal taxes, thus placing the entire tax burden on the two-thirds share passing to the testator's grandchildren. Accordingly, the executor reported a gross estate of $13,201,347.91 from which it deducted specific bequests, debts and administration expenses, the marital deduction comprising Margaret's undiminished share of the residue augmented by a "widow's allowance" of $350,000 made by the Connecticut Probate Court for the District of Hamden but reduced by $281,752.70 of "other death taxes." A taxable estate of $8,392,892.80 was declared on which a tax liability of $4,028,613.85 was reported.

Upon audit, the District Director of Internal Revenue (the Director) disallowed the $350,000 widow's allowance as a part of the marital deduction (one-third, $116,666.67 was allowed because it would otherwise have passed to the marital trust) and decreased the marital trust from $3,630,243.95 to $1,682,846.59. The latter reduction was based upon the Director's construction of paragraph "ONE" of the will as requiring the deduction from the gross estate of all federal, state and state succession taxes before the marital trust of one-

third of the residue could be computed. Thus, all the residuary legatees were required to share the tax burden equally. To arrive at his figure, he submitted an "explanation of items" showing an adjusted gross estate of $12,380,897.22 from which he deducted certain bequests, various state taxes and a federal estate tax ($5,108,442.48), leaving a residue of $5,048,539.76, one-third of which, $1,682,846.59, he allowed as the marital trust. Upon the basis of this adjustment, the Director by 30-day letter asserted a tax deficiency of $1,336,468.40 which the executor paid. This suit for refund followed on the theory that Margaret's share should not have been diminished by federal taxes, thus increasing the marital deduction and eliminating the assessed deficiency.

After receipt of the 30-day letter, the executor in November 1961 applied to the Probate Court in Connecticut for a determination as to how, under Conn. Gen. Stat. sections 12-400, 401(a), 404, 405 (1964 Rev.), the federal estate tax on the residuary bequests should be prorated between those bequests.[2] The Probate Court approved the executor's proposed

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[2] Section 12-401(a) is the most pertinent of these statutes and provides in part:

"*Proration of estate taxes. Procedure.* (a) When it appears from any administration account, or in any appropriate proceeding in the probate court that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity has paid a death tax levied or assessed under the provisions of chapter 217, hereinafter called the Connecticut estate tax, or under the provisions of the United States internal revenue code or under any death tax law of the United States hereafter enacted, hereinafter called the federal estate tax, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except when a tes-

proration on the theory that it could not say that under state law there was "a clear and unambiguous direction against proration among shares of the residue; and such it must be if there is to be no proration in the residue [citing cases]."

Upon motion by the plaintiff-executor for summary judgment, the District Court held (1) that the widow's allowance of $350,000 did not qualify as part of the marital deduction; (2) that the Connecticut proration laws apply because there was no "clear and unambiguous direction" to the contrary; (3) that the federal court was not bound by the Probate Court's determination in virtually a non-adversary proceeding; and (4) that the marital trust was not to be reduced by any portion of federal estate tax liability.

Upon appeal the Government asserts error in the trial court's conclusion that the language of paragraph "ONE" of the will is not a clear and unambiguous direction against proration.

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[2] [Continued]

tator otherwise directs in his will or when, by written instrument executed inter vivos, direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such inter vivos instrument, shall, except as hereinafter provided in subsection (b), be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such proration shall be made in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate, except that, in making such proration, allowances shall be made for any exemptions granted by the act, imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate . . .".

The problem to be resolved is succinctly stated (in its brief) by the Executor:

> ". . . if the Connecticut proration statutes do not apply, as the United States contends, all of the federal estate tax is payable from the estate before the residuary is determined, the widow's trust of one-third of the residue bears one-third of the amount of the federal estate tax and the amount of the marital deduction is reduced by that one-third amount. On the other hand, if the Connecticut proration statutes do apply, as plaintiff contends, the amount of the widow's trust is determined before the payment of the federal estate tax, at least on the residue; that trust, being itself exempt from tax as part of the marital deduction, bears no part of such tax; and the marital deduction is the full amount of the property passing to the widow. Thus, the basic issue is whether or not the Connecticut proration statutes apply in this case."

It would be difficult to conceive of a clearer direction expressing the thought that death taxes, together with debts and funeral expenses, were to be paid out of the estate. The first sentence of Article One ("I direct my executors to pay out my just debts and funeral expenses and any death taxes . . .") has been held in cases where similar language was construed not only to shift the tax burden to the residue as an expense of administration, *Starr* vs. *Watrous*, 116 Conn. 448, 165 Atl. 459 (1933), but also as the equivalent of a direction against proration among the residuary legatees. *Crump* vs. *Crump*, 20 Conn. Supp. 471, 140 A.2d 143 (Super. Ct. 1957). The "inclusion of them [taxes] in the same classification as debts, funeral expenses . . ." is an expression of "an intention that they should be paid out of the estate in the same way and from the same funds as these other charges." *Starr* vs. *Watrous, supra*, 116 Conn. at , 165 Atl. at 460.

Any far-fetched doubt as to the testator's intent in the first sentence of paragraph "ONE" is quickly dispelled by the sentence in which he specifically declares that "the provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries * * * shall be without effect in the settlement of my estate." The trial court conceded that "the first sentence shifts the tax burden to the residue"; but was of the opinion that "the clause in the second sentence of Article one referring to the ultimate payment of taxes by them [the beneficiaries]" created a conflict with the first sentence and, therefore, an ambiguity in the direction against proration.

There are two fallacies in the trial court's position. First is the assumption that the "beneficiaries" in the second sentence are intended as the residual legatees only and, second, is the assumption, built upon the first, that the residuary legatees "are not to be held for the 'ultimate payment' of death taxes." From these assumptions, the court reaches the conclusion that, since "some legatees must pay the death taxes out of their shares of the estate," "to direct that neither pre-residuary [in the first sentence] nor residuary legatees [in the second sentence] are to be liable for death taxes, although testator must have known that the taxes must come from one or the other of these sources, renders such directions ambiguous." 222 F. Supp. at 454-55. But such ambiguity results only from the court's assumptions — not from the language of the will. The testator was not directing that his beneficiaries were not to be affected in any way by the payment of death taxes. His very explicit treatment of the subject in the initial paragraph evidences his awareness of the necessity of their payment. The sentence deals with the possible provisions of "any statute requiring the apportionment or proration of such taxes" or of [any statute requiring] "the ultimate

payment of such taxes by them." The "them" refers to "the beneficiaries of this will or the transferees of such property." The words "ultimate payment" can refer only to the type of statute which might require ultimate payment on an apportioned basis. Such statute the testator declared was to be "without effect in the settlement of my estate." Thus, in summary, the testator specifically wished to have death taxes paid out of his estate but without proration. Once these were paid, the executor could undertake to comply with his remaining wishes. Ultimately there would be a residue. *A fortiori* without tax deductions from the pre-residuary bequests, the residue would be diminished by the federal estate tax and each of the three trusts equally diminished by one-third of that amount.

Nor can ambiguity be found in the testator's republication of his will to qualify the marital trust under section 2056. The trial court also found an ambiguity in the fact that a direction against statutory proration was included in the original will although the marital trust was then not qualified as a deduction under Section 2056 and was not insulated from the burden of federal estate taxes by the Connecticut proration statutes. The court reasoned that "to attribute to the testator a direction against proration where no proration was possible, would render uncertain what the testator 'did * * * mean by what he did say.'" 222 F. Supp. at 454. The modification in giving his wife a power of appointment over her one-third share does not bespeak any intention to alter his wishes expressed in paragraph "ONE," which was specifically republished and confirmed. Moreover, the will in any event would speak as of the date of death when proration under the Connecticut statutes presented a definite problem to be guarded against. *Union & New Haven Trust Co.* vs. *Sullivan*, 142 Conn. 685, 116 A.2d 908 (1955); *Mead* vs. *Close*, 115 Conn. 443, 161 Atl. 799 (1932); *Travis* vs. *Wolcottville School Soc'y*, 113

Conn. 618, 155 Atl. 904 (1931). With his attention focused on the consequences of the marital deduction change, the testator had ample opportunity to consider on republication any further special tax treatment for his wife's one-third share had he desired to do so. Thus, the will and codicil must be considered as "the expression of a single testamentary act." *Appeal of Shey*, 73 Conn. 122, 124, 46 Atl. 832 (1900). The reasoning in the opinion of the New York Court of Appeals in *In the Matter of Ellen W. Duryea*, 277 N.Y. 310, 317, 14 N.E. 2d 369, 371 (1938), is persuasive, the court saying:

> "It is clear that it was the intent of the testatrix to direct payment of all gifts, legacies and devises provided for under her will free from and without deduction on account of taxes properly assessed on account of such gifts, legacies and devises, and that the taxes thereon should be paid out of her residuary estate. It must be assumed, since she affirmed that part of her original will in the codicil by which she gave the powers of appointment, that it was her intention that the taxes assessed on gifts made by her under those powers should likewise be payable out of her residuary estate."

The courts would indeed be making a new will for the testator if paragraph "ONE" were to be interpreted as a direction that federal estate taxes not be paid "out of my estate" but that they be borne solely by the "two-thirds" trusts for the grandchildren. The codicil shows a desire to qualify one-third of the residue as a marital deduction. It does not disclose an intention to have this part of the residue in effect tax free and grossly disproportionate to the other two-thirds. That which the testator did not choose to do during his lifetime the courts should not do after his death.

The executor and the Government have made extensive arguments as to the effect of the Connecticut Probate Court's adjudication that the Connecticut proration statutes applied. The trial court after carefully considering the arguments and the many relevant decisions concluded that "the decrees of the Connecticut Probate Court — which is not a court of record and most of the judges of which are laymen, not lawyers — under no circumstances can be construed as binding and conclusive upon a federal court in construing and applying the federal revenue laws." 222 F. Supp. at 457. This court is in accord with the trial court's conclusion as to the effect of the state decree, see *Estate of Hamilton H. Peyton* vs. *Commissioner*, 323 F.2d 438 (8th Cir. 1963), since under Connecticut law the Probate Court's decisions are not binding on the state's higher courts, *Heiser* vs. *Morgan Guaranty Trust Co.*, 150 Conn. 563, 192 A.2d 44 (1963), and are even subject to collateral attack in another probate district, *Culver's Appeal from Probate*, 48 Conn. 165, 172-174 (1880). Under the circumstances, it was unnecessary "to make a finding as to whether the proceedings in the Probate Court were collusive or non-adversary in nature" and the court properly refrained from so doing.

The question of the District Court's failure to include the $350,000 widow's allowance is no longer before this court because the executor concedes that the Supreme Court's decision in *Jackson* vs. *United States*, 376 U.S. 503 (1964), handed down after the trial court's decision and before argument of this appeal, is controlling. In that decision, the Supreme Court held, as did the trial court here, that the allowance was a terminable interest and, therefore, did not qualify for the marital deduction.

Nor is the question of the proper computation of the judgment before us in view of our conclusion that the proration statutes do not apply.

As the Government states (in brief), "In this unusually complicated estate tax case the sole issue is the amount of the marital deduction allowed by Section 2056 of the Internal Revenue Code of 1954 * * *." The intricate algebraic formulae and the arithmetical backing and filling required to compute the tax attest to this complexity. See, *e.g.*, 1 CCH Fed. Est. & Gift Tax Rep., ¶ 2090, at 3056-3087, dealing with the valuation of the marital deduction.

By this decision construing paragraph "ONE" to direct that the proration laws of Connecticut do not apply, we do not intend to foreclose the executor or the Government from making such adjustments or revisions in the federal estate tax as may be necessary to give full advantage to the estate of the marital deduction as it may be properly computed in accordance with such construction.

The judgment of the District Court is reversed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of September, one thousand nine hundred and sixty-five.

Present: HON. LEONARD P. MOORE, HON. IRVING R. KAUFMAN,

Circuit Judges.

THE SECOND NATIONAL BANK OF NEW HAVEN,
EXECUTOR OF THE WILL OF FREDERICK F. BREWSTER,
LATE OF HAMDEN, DECEASED,

Plaintiff - Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant - Appellant.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

Internal Revenue Code of 1954:

SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

(a) *Allowance of Marital Deduction.* For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) *Limitation in the Case of Life Estate or Other Ter-Terminable Interest.* —

• • •

(4) Valuation of interest passing to surviving spouse. — In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section —

(A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; and

(B) where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined.

(5) *Life estate with power of appointment in surviving spouse.* — In the case of an interest in property passing

from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse —

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest for such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

• • •

(c) *Limitation on Aggregate of Deductions.* —

(1) *General rule.* — The aggregate amount of the deductions allowed under this section (computed without regard to this subsection) shall not exceed 50 per cent of the value of the adjusted gross estate, as defined in paragraph (2).

(2) *Computation of adjusted gross estate.* —

(A) *General rule.* — Except as provided in sub-paragraph (B) of this paragraph, the adjusted gross estate

shall, for purposes of subsection (c)(1), be computed by subtracting from the entire value of the gross estate the aggregate amount of the deductions allowed by sections 2053 and 2054.

(d) *Disclaimers.* —

(1) *By surviving spouse.* — If under this section an interest would, in the absence of a disclaimer by the surviving spouse, be considered as passing from the decedent to such spouse, and if a disclaimer of such interest is made by such spouse, then such interest shall, for the purposes of this section, be considered as passing to the person or persons entitled to receive such interest as a result of the disclaimer.

(2) *By any other person.* — If under this section an interest would, in the absence of a disclaimer by any person other than the surviving spouse, be considered as passing from the decedent to such person, and if a disclaimer of such interest is made by such person and as a result of such disclaimer the surviving spouse is entitled to receive such interest, then such interest shall, for purposes of this section, be considered as passing, not to the surviving spouse, but to the person who made the disclaimer, in the same manner as if the disclaimer had not been made.

(e) *Definition.* — For purposes of this action, an interest in property shall be considered as passing from the decedent to any person if and only if —

(1) such interest is bequeathed or devised to such person by the decedent;

(2) such interest is inherited by such person from the decedent;

(3) such interest is the dower or curtesy interest (or statutory interest in lieu thereof) of such person surviving spouse of the decedent;

(4) such interest has been transferred to such person by the decedent at any time;

(5) such interest was, at the time of the decedent's death, held by such person and the decedent (or by them and any other person) in joint ownership with right of survivorship;

(6) the decedent had a power (either alone or in conjunction with any person) to appoint such interest and if he appoints or has appointed such interest to such person, or if such person takes such interest in default on the release or nonexercise of such power; or

(7) such interest consists of proceeds of insurance on the life of the decedent receivable by such person.

Except as provided in paragraph (5) or (6) of subsection (b), where at the time of the decedent's death it is not possible to ascertain the particular person or persons to whom an interest in property may pass from the decedent, such interest shall, for purposes of sub-paragraphs (A) and (B) of subsecsection (b)(1), be considered as passing from the decedent to a person other than the surviving spouse.

(26 U.S.C. 1958 ed., Sec. 2056.)

II General Statutes Of Connecticut, Revision of 1958 (Rev. 1964):

Sec. 12-400. "Persons interested in the estate," defined. For the purpose of this chapter, "persons interested in the estate" includes all persons who may be entitled to receive or who

have received any property or interest which is required to be included in the gross estate of a decedent or any benefit with respect to any such property or interest whether under a will or intestacy or by reason of any of the transfers, trusts, estates, rights, powers and relinquishment of powers, as severally enumerated in the United States internal revenue code.

Sec. 12-401. Proration of estate taxes. Procedure. (a) When it appears from any administration account, or in any appropriate proceeding in the probate court that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity has paid a death tax levied or assessed under the provisions of chapter 217, hereinafter called the Connecticut estate tax, or under the provisions of the United States internal revenue code or under any death tax law of the United States hereafter enacted, hereinafter called the federal estate tax, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except when a testator otherwise directs in his will or when, by written instrument executed inter vivos, direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such inter vivos instrument, shall, except as hereinafter provided in subsection (b), be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such proration shall be made in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate, except that, in making such proration, allowances shall be made for any exemptions granted by the act, imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate

and except that, in cases where a trust is created or other provision made whereby any person is given an interest in income or an estate for years or for life or other temporary interest in any property or fund, the tax on both such temporary interest and the remainder thereafter shall be charged against and paid out of the corpus of such property or fund without apportionment between remainders and temporary estates. In all cases to which this chapter applies, except as hereinafter provided in subsection (b), the executor, administrator or other person acting in a fiduciary capacity shall include as a part of the administration account or other proceeding in the probate court a computation of the proposed proration. Before determining such proration, the probate judge shall, except as hereinafter provided in subsection (c), appoint a time and place for a hearing thereon and shall cause such notice of such hearing to be given to the parties in interest as he directs. In making the proration herein provided for, the credit allowed by the law imposing the federal estate tax for gift taxes paid, or for any estate, inheritance, legacy or succession taxes actually paid with respect to the estate to any state or territory or the District of Columbia, shall be assumed to apply pro rata to all parts of the gross taxable estate subject to such federal estate tax. (b) If the judge of probate finds with or without a hearing thereon, from the administration account or other evidence available to and satisfactory to him, including written consents by those to whom the tax has been charged, that the federal estate tax and Connecticut estate tax, if any, as finally determined, have been paid and that the ultimate burden of such tax or taxes has been borne by a party or parties in interest in a manner satisfactory to them, or to their legal representatives, as evidenced by the written consent of such persons or of their legal representatives, no proration of the federal estate tax or Connecticut estate tax shall be made

unless specially requested by any party in interest. (c) Upon receipt of the computation provided for in subsection (a), the probate judge shall make a determination of the proration of the federal estate tax, if any, in the manner provided by subsection (a), except that, if all parties affected by such proration or their legal representatives endorse upon such computation their approval thereof, no hearing need be held thereon, but such determination may be made ex parte.

Sec. 12-404. Order directing payment of prorated amounts. The probate judge, upon making a determination as provided in section 12,401, shall make an order directing the executor, administrator or other fiduciary to charge the prorated amounts against the persons against whom the tax has been so prorated so far as he is in possession of property or interests of such persons, and directing all other persons against whom the tax has been so prorated or who are in possession of property or interests of such persons to make payment of such prorated amounts to such executor, administrator or other fiduciary.

Sec. 12-405. Appeal. Any person aggrieved by any determination or order made by the probate judge pursuant to this chapter may appeal therefrom to the superior court in the same manner and with the same effect as from other orders or decrees to the probate court.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 240

THE SECOND NATIONAL BANK OF NEW-HAVEN, EXECUTOR OF THE WILL OF FREDERICK F. BREWSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This case involves the effect to be given in a federal estate tax suit to a State trial court decree determining the character of an interest in property held or transmitted by a decedent at his death. Because there is a conflict among the circuits on this important and recurring question, we acquiesce in the petition for a writ of certiorari insofar as it is addressed to this issue.

Decedent's will and codicil provided, in part, that one-third of his residuary estate was to be held in

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trust for his widow, who was to receive the income from this trust during her life and was given a general testamentary power of appointment over the corpus. Decedent left the other two-thirds of his residuary estate in trust for his grandchildren. (R. 19a, 28a.[1])

The widow's trust clearly qualified for the estate tax marital deduction; the only question was the amount of the deduction. If, under Connecticut law, the federal estate tax was to be paid out of the residue of decedent's estate, the widow's trust would be approximately $1,700,000 (1/3 of the residue *after* payment of taxes) and only this amount would qualify for the estate tax marital deduction. See Int. Rev. Code of 1954, § 2056(b)(4)(A). If, on the other hand, under Connecticut law, the federal estate tax was to be paid only out of the grandchildren's two-thirds share of the residue, the widow's trust would be approximately $3,600,000 (1/3 of the residue *before* reduction for taxes) and this larger amount would qualify for the estate tax marital deduction. (R. 69a, 88a–89a; Pet 9a.)

If Connecticut's proration statute (Pet. 7a–8a, fn. 2) applies in this case the entire federal estate tax liability would be paid out of the grandchildren's share of the residue.[2] The proration statute is ap-

[1] "R" references are to the printed record in this case set forth in Appendix B to the government's brief in the court of appeals.

[2] Under the proration statute no tax is payable out of an interest which is deductible for federal estate tax purposes; therefore no tax would be payable out of the widow's trust since it qualified for the marital deduction (Pet. 9a).

plicable unless the decedent's will otherwise provides. Decedent's will directs his executors "to pay" "death taxes" "out of my estate" and further states that "The provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries of this will * * * shall be without effect" (R. 14a).

On decedent's estate tax return petitioner (decedent's executor) claimed a marital deduction of $3,600,000. The Commissioner took the position that decedent's will had negatived application of the proration statute and therefore the allowable marital deduction was only $1,700,000.

After receipt of the 30-day letter stating the Commissioner's position, petitioner filed an application in the Connecticut probate court seeking a determination that it was proper to allocate the entire tax liability to the grandchildren's trust (R. 31a–42a, 89a). Notice of hearing on this application was given to the widow, to the District Director of Internal Revenue (who did not appear), to beneficiaries of the grandchildren's trust who had come of age, and to a guardian *ad litem* representing the minor grandchildren (R. 38a–39a, 78a–79a, 80a, 89a). The guardian *ad litem*, an attorney, filed a memorandum stating that if the tax were to be allocated under the proration statute, the trusts created for his wards would bear "substantially the entire tax" (R. 76a). Nevertheless, he stated that he had "no objection to the granting of the Executors' Application for the Proration of the Federal Estate Tax" (R. 76a-78a). So far as the record shows, no one opposed the executor's applica-

tion. After a hearing at which only the guardian *ad litem* and the executor's attorneys were present, the Probate Court filed a memorandum of decision which, without mentioning the above-quoted language in the decedent's will, followed the only position asserted by the parties and held that the proration statute applied, on the ground that the decedent's will did not unambiguously direct otherwise (R. 80a–81a).

Petitioner paid a deficiency of $1,333,194 plus interest, brought suit for a refund, and moved for summary judgment (R. 12a, 48a, 51a, 89a, 90a). The federal district court held that it was not conclusively bound by the Connecticut Probate Court's determination but granted summary judgment for petitioner on the ground that the decedent's will had not negatived application of the proration statute (R. 96a–110a). The court of appeals agreed that the district court was not conclusively bound by the Probate Court decree, but it reversed the district court's judgment on the ground that the decedent's will "would seem to be clear and unambiguous to the effect that taxes were to come out of his residual estate and that despite any contrary statute the testator specifically wished to avoid any proration" (Pet. 6a). The court of appeals held that the probate decree was not binding in the federal tax case without regard to whether

the probate proceedings had been "collusive or non-adversary in nature" (Pet. 13a). The court of appeals denied a petition for rehearing and rehearing *en banc* (Pet. 2).

The petition for a writ of certiorari presents two questions:

(1) Whether under Connecticut law the estate tax should be paid (as petitioner contends) entirely out of the grandchildren's trust or (as the court of appeals held) out of the entire residue of decedent's estate including the one third of the assets bequeathed to the widow's trust.

(2) Whether the federal courts were conclusively bound in this federal estate tax controversy by the Connecticut Probate Court's decree.

For the reasons stated below we oppose certiorari as to question (1) and acquiesce as to question (2).

1. The Connecticut proration statute does not apply "when a testator otherwise directs in his will" (Conn. Gen. Stat. § 12–401; Pet. 7a–8a, fn. 2). After careful analysis of the language of the will and codicil here involved, the court of appeals concluded that the language was "clear and unambiguous to the effect that taxes were to come out of his residual estate and that * * * the testator specifically wished to avoid any

proration" (Pet. 6a).[3] This conclusion is correct, but, even if it were not, interpretation of the particular language used in decedent's will presents solely an issue of State law and no issue of general importance warranting review by this Court.

2. The second issue presented by the petition for certiorari is the effect to be accorded the State Pro-

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[3] The Court stated that (Pet. 9a–10a, 12a):

"It would be difficult to conceive of a clearer direction expressing the thought that death taxes, together with debts and funeral expenses, were to be paid out of the estate. The first sentence of Article One ('I direct my executors to pay out [of my estate] my just debts and funeral expenses and any death taxes * * *') has been held in cases where similar language was construed not only to shift the tax burden to the residue as an expense of administration, *Starr* vs. *Watrous*, 116 Conn. 448, 165 Atl. 459 (1933), but also as the equivalent of a direction against proration among the residuary legatees. *Crump* vs. *Crump*, 20 Conn. Supp. 471, 140 A. 2d 143 (Super. Ct. 1957). The 'inclusion of them [taxes] in the same classification as debts, funeral expenses * * *' is an expression of 'an intention that they should be paid out of the estate in the same way and from the same funds as those other charges.' *Starr* v. *Watrous*, *supra*, 116 Conn. at [453], 165 Atl. at 460.

"Any far-fetched doubt as to the testator's intent in the first sentence of paragraph 'One' is quickly dispelled by the sentence in which he specifically declares that 'The provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries * * * shall be without effect in the settlement of my estate.'

* * * * * *

* * * The codicil shows a desire to qualify one-third of the residue as a marital deduction. It does not disclose an intention to have this part of the residue in effect tax free and grossly disproportionate to the other two-thirds. That which the testator did not choose to do during his lifetime the courts should not do after his death."

bate Court decree in the instant federal estate tax litigation. The court below concluded that the State court's decision was not "binding and conclusive upon a federal court in construing and applying the federal revenue laws" (Pet. 13a).

We believe that the court below reached the correct result, and disagree with the petitioner's assertion (Pet. 16–17) that it conflicts with decisions of this Court. However, we agree that the instant result cannot fairly be reconciled with either the decisions of the Third Circuit attributing binding effect to a State trial court decree for estate tax purposes[4] or with a subsequent split decision by an entirely different panel of the Second Circuit. *Commissioner* v. *Estate of Herman J. Bosch*, decided July 6, 1966 (C.A. 2), in which the government is contemporaneously filing a petition for certiorari. The existence of this direct conflict between the courts of appeals is discussed in our petition for a writ of certiorari in the *Bosch* case (a copy of which is being served on the petitioner in this case).

Although we believe that the result reached by the court below in the instant case is correct, we agree that the petition for a writ of certiorari should be granted upon this issue, because of the direct conflict

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[4] *Babcock's Estate* v. *Commissioner*, 234 F. 2d 837, 841–842 (C.A. 3); *Beecher* v. *United States*, 280 F. 2d 202, 203–204 (C.A. 3); *Darlington's Estate* v. *Commissioner*, 302 F. 2d 693, 694 (C.A. 3); see also *Gallagher* v. *Smith*, 223 F. 2d 218, 222–223 (C.A. 3).

between the circuits and the important and recurring nature of the problem.

Respectfully submitted,

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OCTOBER, 1966.

*In lieu of the Solicitor General, who has disqualified himself.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Acting Solicitor General, on behalf of the Commissioner of Internal Revenue, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Tax Court (R. 23–31) [1] is reported at 43 T.C. 120. The opinion of the court of appeals (Appendix A, *infra*, pp. 15–36) is not yet officially reported.

[1] "R." references are to Appendix B to the Commissioner's brief in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1966 (Appendix, *infra*, p. 36). On October 4, 1966, Mr. Justice Harlan granted an extension of time within which to file a petition for a writ of certiorari to November 3, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

When the resolution of an issue in a federal estate tax controversy depends upon the character of a property interest owned or transferred by the decedent and the character of such interest has been determined by a State trial court in a proceeding to which the United States was not a party, is the federal court conclusively bound by that decision even though it is contrary to State law?

STATUTES INVOLVED

The relevant portions of § 2056 of the Internal Revenue Code of 1954 are set forth in Appendix B, *infra*, pp. 37–40.

STATUTE INVOLVED

Decedent, a resident of New York, died on April 6, 1957. In 1930, he had created a revocable trust which (as subsequently amended in 1931) directed that the income therefrom be paid to his wife during her life, granted her a general power to appoint the corpus by will to any "persons and/or corporations," and provided for an alternate disposition if she failed to exer-

cise the general power of appointment. On October 25, 1951 (five and one-half years before decedent's death), his wife, seeking to prevent the corpus of the trust from being taxed as part of her gross estate at her death, executed an instrument which purported to release a portion of her general power of appointment and convert it into a special power of appointment. (R. 5–6, 11, 12, 24, 34–44.)

Decedent's executor claimed a marital deduction for the value of the trust at the time of his death, *i.e.*, $70,222. The Commissioner determined that the trust corpus did not qualify for the marital deduction. The executor filed a petition in the Tax Court for a redetermination of the asserted deficiency. In order for the trust to qualify for the marital deduction, decedent's widow must have possessed, at the time of decedent's death, both the right to the income from the trust for her life plus a general power of appointment over the trust assets. 1954 Code, Section 2056(b)(5). Therefore, the Tax Court controversy turned on whether decedent's widow had in 1951 effectively released a portion of her general power of appointment and converted it into a special power of appointment (in which case no marital deduction would be allowable). (R. 3–8, 11, 51.)

While the Tax Court proceeding was pending, the trustee, which was also the executor of decedent's estate, filed a petition in the New York Supreme Court, at least in part for the purpose of affecting the outcome of the Tax Court action, seeking a determina-

tion as to the validity of the widow's October 25, 1951, partial release. Three briefs were filed in that proceeding—one for the trustee, one for Mrs. Bosch, and one by a guardian *ad litem* on behalf of a minor who was a possible beneficiary in the event Mrs. Bosch died without exercising her power of appointment. All three briefs argued that the release was a nullity. No argument to the contrary was presented to the State court. The New York Supreme Court adopted the position maintained in the only briefs before it, and held that the partial release of the general power of appointment was a nullity. (R. 13, 18–19, 25–26, 49–52, 56.)

Without discussing any New York statutes or decisional law, the Tax Court accepted the New York decision "as an authoritative exposition of New York law and adjudication of the property rights involved" (R. 31), and allowed the executor a marital deduction for the entire value of the trust. In so doing, the Tax Court declined to decide whether it was bound by the New York trial court's decision. (R. 26, 31, 32.)

A divided court of appeals affirmed. The majority held that it was conclusively bound by the decision of the State trial court, without regard to whether that decision resulted from a non-adversary proceeding and was incorrect under State law (App., *infra*, pp. 24–26). Judge Friendly, in his dissenting opinion, concluded, after a comprehensive discussion of the problem, that the State trial court's holding that the partial release was a nullity was incorrect. He also rejected the

"mechanical view" adopted by the majority, which would permit the taxpayer to bind the Internal Revenue Service by obtaining a State trial court decision, despite the facts (1) that the parties to the State proceeding had no "genuine controversy," (2) that the State trial court did not have "the benefit of a fair presentation of both sides" of the question, and (3) that the "state court litigation [was] brought primarily to have an effect on federal taxes" (App., *infra*, pp. 27, 29).

REASONS FOR GRANTING THE WRIT

The question of the effect to be given in federal estate tax litigation to a decision of a lower State court characterizing property interests that are determinative of federal estate tax consequences is a recurrent one, of substantial administrative importance.[2] The dissenting opinion below graphically points up the "widespread conflict among the circuits" (App., *infra*, p. 27), and the consequent need for the establishment of guiding principles by this Court, which as Judge Friendly observed, "has not spoken to the point for nearly thirty years" (App., *infra*, p. 27).

1. This Court last addressed itself to the basic issue presented here in *Blair* v. *Commissioner*, 300 U.S. 5,

[2] While most of the cases involve the federal estate tax, the same principles would appear to apply to any federal tax the incidence of which depends upon the characterization of the taxpayer's property interests under State law. For simplicity, however, we refer to the problem herein solely in terms of the federal estate tax.

and *Freuler* v. *Helvering*, 291 U.S. 35. In *Blair*, this Court held that a federal court deciding an issue governed by State law was bound to follow the decision of a State intermediate appellate court where that court, having "reviewed the decisions of the Supreme Court of the State" "reached a deliberate conclusion" (p. 10). In *Freuler*, this Court held that where Congress had provided (in a section of the Code which was subsequently repealed) that the incidence of taxation depended upon an "order" governing distribution of trust income, a federal court was bound to accept the distribution "order" entered by a State trial court, at least where "all the parties [had not] joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax" (p. 45).

2. In the intervening years, conflict has developed among the circuits. As the dissenting judge below observed, two "polar" positions have emerged in the decisions of the courts of appeals. The first, as described by Judge Friendly, is that any judgment of an inferior State court "which is effective as a determination of property rights among the parties is conclusive upon the federal fisc" (App., *infra*, p. 27). This view has been adopted by the Third Circuit[3] and, in the instant case, by the Second Circuit.

[3] See *Darlington's Estate* v. *Commissioner*, 302 F. 2d 693, 694–695 (C.A. 3); *Beecher* v. *United States*, 280 F. 2d 202, 203–204 (C.A. 3); *Babcock's Estate* v. *Commissioner*, 234 F. 2d 837, 841–842 (C.A. 3); *Gallagher* v. *Smith*, 223 F. 2d 218 (C.A. 3),

The Third Circuit has stated its position as follows (*Darlington's Estate* v. *Commissioner, supra,* pp. 694–695):

> * * * [I]f federal law makes federal tax treatment depend, without further qualification, upon who has what rights in an estate under state law, a state court's adjudication which is final in its effect upon those rights must also be taken as final as to the tax matters which depend upon those rights * * * [and for this result to obtain] it is not necessary that the adjudication be the result of a contest in which one party says yes and another no. * * *

The majority opinion below held that when a "party comes into the federal court with his rights already fixed by a decision of a state tribunal * * * [t]here is no occasion to inquire into the general law of the state to ascertain what those rights are" (App., *infra,* p. 23).

Most of the courts of appeals that have considered the question, however, have rejected the rule laid down by the Third Circuit and followed by the Second Circuit in the instant case. Two principal approaches are reflected in these decisions, some courts relying in part on both rationales. A number of decisions have lent support to the view—characterized by Judge Friendly as the other "polar" position—that the judgment of a State trial court characterizing a property interest can never be binding on a federal court in an estate tax proceeding and that where federal estate tax consequences turn upon the character of a property interest held or transferred by the decedent, fed-

eral courts are under a duty to make their own determination of the property interest in accordance with State law as determined by the highest court of the State. According to this view, Congress intended the federal courts to ascertain the character of a taxpayer's property interests under State law in accordance with the approach of the Rules of Decision Act, 28 U.S.C. 1652, whether or not there has been a prior characterization by a State trial court. See, *e.g.*, *Old Kent Bank and Trust Co.* v. *United States*, 362 F. 2d 444, 449 (C.A. 6); *Peyton's Estate* v. *Commissioner*, 323 F. 2d 438, 443 (C.A. 8); *Faulkerson's Estate* v. *United States*, 301 F. 2d 231, 232–233 (C.A. 7), certiorari denied, 371 U.S. 887; *Brainard* v. *Commissioner*, 91 F. 2d 880, 883–884 (C.A. 7).[4]

A majority of the courts of appeals appear to have placed primary reliance on an intermediate approach and to have held that a federal court is not bound by a decree of a State trial court if that decree resulted from a non-adversary proceeding. See *In re Sweet's Estate*, 234 F. 2d 401, 404 (C.A. 10), certiorari denied, 352 U.S. 878; *Faulkerson's Estate* v. *United States*, *supra*, at 233; *Old Kent Bank and Trust Co.*

[4] See also *Second National Bank of New Haven* v. *United States*, 351 F. 2d 489 (C.A. 2), petition for certiorari pending, No. 240, O.T., 1966, where a different panel of the same court held that "under no circumstances can [the decrees of the Connecticut Probate Court] be construed as conclusive and binding upon a federal court in construing and applying the federal revenue laws" (p. 494). In the present case the court distinguished that decision on the ground that a "determination of the Connecticut Probate Court was not authoritative in Connecticut" (App., *infra*, pp. 25–26). We do not, however, think the two decisions can be reconciled in principle.

v. *United States, supra,* at 449–450; *Pierpont* v. *Commissioner,* 336 F. 2d 277, 281 (C.A. 4), certiorari denied, 380 U.S. 908; *Saulsbury* v. *United States,* 199 F. 2d 578, 580 (C.A. 5), certiorari denied, 345 U.S. 906; *Stallworth's Estate* v. *Commissioner,* 260 F. 2d 760, 763 (C.A. 5); *Peyton's Estate* v. *United States, supra,* at 443–444; see also *Stark* v. *United States,* 351 F. 2d 160, 163 (C.A. 6), certiorari denied, 384 U.S. 939. Compare *Newman* v. *Commissioner,* 222 F. 2d 131, 136 (C.A. 9), and *Wolfsen* v. *Smyth,* 223 F. 2d 111, 113–114 (C.A. 9), with *Flitcroft* v. *Commissioner,* 328 F. 2d 449, 453–454 (C.A. 9). According to this view, Congress did not intend non-adversary State court proceedings which involved no genuine controversy between the parties and in which the parties did not present both sides of the question upon which the federal tax turns to be conclusive for federal estate tax purposes. Such proceedings should not be regarded for tax purposes as controlling determinations as to the character of the property interests held or transferred by the decedent at the time of his death; they merely confirm post-mortem agreements unanimously reached by the affected parties with respect to the disposition of the decedent's property. So long as Congress does not generally permit voluntary post-death agreements between a decendent's heirs to affect the computation of a decedent's estate tax liability, the federal courts should not be bound to recognize an uncontested State trial court decree entered in a non-adversary proceeding, which merely ratifies such a post-mortem arrangement.

It is apparent from the foregoing that the instant decision of the Second Circuit and the decisions of

the Third Circuit giving binding effect to State trial court decrees cannot be reconciled with the decisions of the Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits declining to give conclusive effect to State court decrees.

3. The decision below is erroneous. Decedent's estate would be entitled to a marital deduction only if, at the time of his death, his widow had a life estate in the trust plus a general power of appointment over the corpus. 1954 Code, § 2056(b)(5). No marital deduction would be allowed if, at the time of her husband's death, she had only a special power of appointment, even if, shortly after his death, all of his other heirs agreed not to assert some of their rights in his estate and voluntarily conceded to her the additional power necessary to give her a general power of appointment. See, *e.g.*, 1954 Code, § 2056(d)(2), (e). In such a case, although the widow might actually have a general power of appointment after the voluntary action of the decedent's heirs, no marital deduction would be allowed because she neither received the general power from her deceased husband (Code § 2056(a), (e)) nor did she have it "at the moment of her husband's death." *Jackson* v. *United States*, 376 U.S. 503, 507–508; see also S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 10 (1948–1 Cum. Bull. 331, 338).[5]

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[5] An exception to this rule is contained in P.L. 89–621, 80 Stat. 872, signed into law on October 4, 1966. This recent amendment to § 2056(d)(2), which is not effective for the years involved here, merely allows a marital deduction in certain limited circumstances where a prompt disclaimer by a legatee other than the decedent's widow has the effect of increasing the bequest to her.

Therefore, in the instant case, decedent's estate should not be entitled to a marital deduction if, at the time of his death, his widow had only a special power of appointment over the trust, and after his death, his heirs, in an effort to save estate taxes, conceded to his widow the additional powers necessary to entitle the estate to a marital deduction, even though the heirs obtained a State trial court's ratification of their action.

After an extensive review of the New York legislation and decisions, Judge Friendly concluded in his dissent that the widow's 1951 release of a part of her general power of appointment was effective under New York law and that the State trial court's decision to the contrary was plainly wrong (App., *infra,* pp. 29–33). The parties to the instant suit concede that all briefs filed in the State trial court "took the same tack or presented the same side of the argument" (R. 19), *i.e.,* that when decedent's widow argued to the State court that her release had been ineffective and that she still had a general power of appointment, "nobody raised a dissenting voice" (R. 19). With all parties arrayed on the same side of the issue, the court was deprived of the benefit of a fair presentation of the merits. As Judge Friendly observed (App., *infra,* p. 33):

> Under these circumstances it is not to be wondered that a judge sitting in the busy motion part of the Supreme Court for New York County should have erroneously ratified the parties' unanimous contention, citing only the inapposite decision of *In re Piffard* * * *.

As the majority of the courts of appeals that have considered the question have held, Congress did not intend that the federal courts hearing estate tax controversies should be conclusively bound by decisions of State trial courts in such circumstances. The conclusion of the lower court—that the federal courts are bound by the State court determination in this case—imputes to Congress an intention to allow a decedent's executor and heirs to manipulate the estate tax burden merely by obtaining judicial ratification of post-mortem intra-family property arrangements. The legislative history of the marital deduction provision, however, makes it clear that Congress did not mean the federal courts to be conclusively bound in such circumstances; it provides that in deciding whether the decedent's spouse received the requisite interest in property from decedent "proper regard should be given to interpretations of the will rendered by a court in *a bona fide adversary proceeding.*" S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 4 (1948–1 Cum. Bull. 331, 333) (emphasis added). Moreover, the estate tax regulations have long provided that—

> If as a result of the controversy involving the decedent's will, or involving any bequest or devise thereunder, a property interest is assigned or surrendered to the surviving spouse, the interest so acquired will be regarded as having "passed from the decedent to his surviving spouse" only if the assignment or surrender was a bona fide recognition of enforceable rights of the surviving spouse in the decedent's estate.

> *Such a bona fide recognition will be presumed where the assignment or surrender was pursuant to a decision of a local court upon the merits in an adversary proceeding following a genuine and active contest.* * * * [Emphasis added.]

Treasury Regulations (1954 Code), § 20.2056(e)–2(d)(2); see also *id.*, § 20.2053–1(b)(2). As Judge Friendly pointed out, the view adopted by the majority below "would permit citizens, unwilling to accept the tax consequences of actions taken by them or their decedents, to evade federal taxes by taking advantage of an unwitting lower state tribunal" (App., *infra*, p. 27). See also *Old Kent Bank and Trust Co.* v. *United States*, *supra*, at 450.

4. The issue presented by the instant case is important and recurring. At least five such cases have been decided by the courts of appeals in the past 13 months.[6] The Third Circuit and the Second Circuit in the instant case apparently consider the decrees of State trial courts to be conclusively binding (see cases cited, *supra*, pp. 6–7), while the other courts of appeals which have passed upon the issue have rejected such a view (see cases cited, *supra*, pp. 8–9). In light of the "widespread conflict among the circuits" (App., *infra*, p. 27) and the importance of the problem in the administration of the revenue laws,

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[6] *Second National Bank of New Haven* v. *United States*, *supra*; *Stark* v. *United States*, *supra*; *Old Kent Bank and Trust Co.* v. *United States*, *supra*; *United States* v. *Farish*, 360 F. 2d 595 (C.A. 5); and the instant case.

this Court should review the decision in the instant case. We are contemporaneously filing a separate memorandum acquiescing in the taxpayer's petition for a writ of certiorari with respect to this issue in *Second National Bank of New Haven* v. *United States*, No. 240, this Term.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER, 1966.

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*In lieu of the Solicitor General, who has disqualified himself.

APPENDIX A

United States Court of Appeals
for the Second Circuit

No. 306—September Term, 1965.

Argued May 25, 1966. Decided July 6, 1966

Docket No. 29883

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR, RESPONDENT

Before FRIENDLY, HAYS, and FEINBERG, Circuit Judges

HAYS, Circuit Judge:

The Commissioner petitions for review of a decision of the Tax Court which held that the Commissioner had erroneously disallowed the sum of $70,222.04 as a marital deduction under Section 2056(b)(5) of the Internal Revenue Code of 1954, 26 U.S.C. § 2056(b)(5).[1] We affirm the Tax Court.

[1] "(5) *Life estate with power of appointment in surviving spouse.*—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, * * * with power in the surviving spouse to appoint the entire interest, * * * (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the in-

The facts are fairly simple and are not in dispute. On April 9, 1930 the decedent set up a trust by the terms of which the income was to be paid to his wife during her lifetime. Upon the death of the wife the corpus was to be paid to the grantor or his estate. The trust was amendable and revocable.

On February 6, 1931 decedent amended the trust instrument to grant to his wife a general power of appointment. She was empowered to appoint by her will the corpus of the trust to any "persons and/or corporations." The amendment provided for a disposition over in the event the wife failed to exercise her power of appointment.

On October 25, 1951, the wife executed a document by which she purported to release a portion of her general power of appointment under the trust and to convert it into a special power of appointment.[2]

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terest, or such specific portion, to any person other than the surviving spouse—

"(A) the interest * * * thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

"(b) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

"This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events."

[2] "KNOW ALL MEN BY THESE PRESENTS:

"WHEREAS I, MARGARET BOSCH, am the life beneficiary of the trust created by a certain Agreement of Trust dated April 9, 1930 between Herman J. Bosch, as Grantor, and Irving Trust Company, as Trustee, which trust is now being administered by said Irving Trust Company as such Trustee; and

"WHEREAS, by an amendment of said Agreement of Trust, dated February 6, 1931, made by said Grantor pursuant to the

It appears from the document itself and it is readily conceded by the trustee, which proposed to Mr. and Mrs. Bosch the execution of the release, that the purpose of the release was to take advantage of the Powers of Appointment Act of 1951, Ch. 165, 65 Stat. 91, amending Int. Rev. Code of 1939, §811(f) (now Int. Rev. Code of 1954, §2041), then recently enacted, and

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power thereby preserved to him, it is provided that in the event that said Grantor shall not survive me, the beneficiary therein named—

"'* * * then upon the death of said Margaret Bosch the Trustee shall pay, transfer and deliver the principal of the trust fund to the persons and/or corporations appointed to receive the same by the Last Will and Testament of Said Margaret Bosch, * * *'

and

"WHEREAS I desire to release in part my contingent power of appointment under said Agreement of Trust in the manner contemplated by the 'Powers of Appointment Act of 1951' amending Section 811(f) and Section 1000(c) of the Internal Revenue Code of the United States of America, so that my said contingent power of appointment under said Agreement of Trust shall not be a general power of appointment,

"NOW, THEREFORE, I, said Margaret Bosch, hereby renounce, relinquish, surrender and release my said contingent power to appoint all or any part of said trust fund by said Agreement of Trust dated April 9, 1930 made by Herman J. Bosch, as amended by instrument dated February 6, 1931, or any property which may hereafter form a part of said trust fund, in favor of myself, my estate, my creditors or the creditors of my estate.

"Any attempted exercise of said power made by my Will which is inconsistent or in any way in conflict with this release and limitation by me of said power shall be void.

"IN WITNESS WHEREOF, I have executed this instrument in duplicate this 25 day of October, 1951.

/s/ MARGARET BOSCH (L.S.)
Margaret Bosch"

thus "to prevent the assets of the trust being taxed as part of Margaret Bosch's estate."

On April 6, 1957 Herman Bosch died. His executor claimed a marital deduction for the value of the trust. The Commissioner determined that the trust did not qualify for the marital deduction and asserted a deficiency in the amount of $70,222.04, the value of the corpus of the trust.

The executor filed a petition in the Tax Court for a redetermination of the deficiency. While the action was pending in the Tax Court, the trustee, which was also executor of the estate of Herman Bosch, brought a proceeding in the New York Supreme Court for a settlement of its account as trustee. In connection with the proceeding in the New York Supreme Court, the trustee asked for a determination of the validity of Mrs. Bosch's release of part of her power of appointment. Respondent stipulated and conceded that the New York proceeding was instituted "at least in part for the purpose of affecting [the] outcome" of the case before the Tax Court. The trustee's petition in the New York court described the proceedings then pending in the Tax Court, and stated the position taken in that proceeding by the executor.

The issue in the state proceeding was whether the release executed by Mrs. Bosch on October 25, 1951 was effective. Three briefs were filed in the New York proceeding, one for Mrs. Bosch, one for the trustee, and one by a guardian *ad litem* in behalf of a minor interested in the trust by reason of being a possible beneficiary in the event Mrs. Bosch died without exercising her power of appointment. All three briefs argued that the release was a nullity. No argument for the validity of the release was presented to the court.

There were twenty-two persons having the same interest as the infant who was represented by the guardian *ad litem*. Although they received notice of the proceeding, none of them appeared.

The state court held that Mrs. Bosch's purported release was a nullity.[3]

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[3] "Matter of Irving Trust Co. (Bosch)—In this proceeding to judicially settle and allow the intermediate account of the trustee under an inter vivos trust, a ruling is requested respecting the validity of an instrument executed by Margaret Bosch, wife of the settlor of the trust, dated October 25, 1951, purportedly partially releasing her contingent power of appointment. On April 9, 1930, Herman J. Bosch created a trust which provided for the payment of income to his wife for her life with a reversion to the grantor if his wife should predecease him, or to his estate if he should predecease his wife, leaving a will, or to his next of kin if he should die intestate. The trust instrument reserved to the grantor the right to alter or amend the trust at any time during his life with the consent of the trustee, and the further right without the consent of the trustee or any other person to revoke the trust in whole or in part. On February 6, 1931, the grantor exercised his right to amend the trust to provide that his wife, Margaret Bosch, should have a general power of appointment over the property of the trust *exercisable by Will* if she survived the grantor. The power in the grantor to further alter, amend or revoke the trust in his lifetime was undisturbed by this amendment. On October 25, 1951, during the lifetime of the grantor, his wife, Margaret Bosch, executed an instrument by which she purported to effect a partial release of the general power of appointment granted to her by the trust instrument as amended. The grantor, Herman Bosch, died on April 6, 1957. The applicable provision of the law is section 183, subdivision 1, of the Real Property Law, which stated: 'Any power which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power in trust which is imperative, is releasable, either with or without consideration, by written instrument signed by the grantee and delivered as hereinafter provided.' This sec-

The Tax Court decided to accept the New York decision and gave the following reasons for doing so:

> 1. The New York court had jurisdiction over the parties and subject matter of the proceeding, and its judgment was final and conclusive as to those parties. Therefore, Mrs. Bosch now has a general power of appointment which she could exercise in favor of herself, her estate, her creditors, or the creditors of her estate.
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> 2. Decisions of the Supreme Court of the State of New York represent legal precedent for courts throughout the state, unlike decisions

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tion, although a part of the Real Property Law, applies to powers of appointment over personal property as well as to powers over real property (Matter of N. Y. Title & Mortgage Co., 150 Misc. 488; In re Goldwitz Will, 145 Misc. 300; Matter of Cooksey's Estate, 182 N.Y. 92). In order that the donee of a power of appointment release any rights under that power, the donee must have the right to exercise the power at the time the purported release is made. It seems clear that the donee of power of appointment cannot exercise it prior to its creation (Matter of Piffard, 111 N.Y. 410). In the instant case, Margaret Bosch, on October 25, 1951, sought to effect a partial release of the power of appointment over the property of the trust. At that time she lacked the power to exercise any rights under the trust instrument. Her power with respect to the trust instrument came into being upon the death of a grantor on April 6, 1957. A power of appointment created under a revocable deed of trust, which power shall be exercised by will, may not be exercised while the settlor of the trust is still alive. Since she could not have exercised the power of appointment on October 25, 1951, she could not have effected a valid partial release of the power on that date. Hence her purported partial release of the power of appointment on October 25, 1951, was a nullity (Matter of Piffard, *supra*). Accordingly, the purported partial release by Margaret Bosch on October 25, 1951, of the power of appointment granted to her by the trust instrument was a nullity. Settle order." N.Y.L.J., November 15, 1963.

of local courts with limited geographical jurisdiction whose decisions are not binding upon other courts of the state.

3. The Commissioner was fully aware of the proceeding in the New York court and could have sought the opportunity to present his views to that court. Indeed, he agreed to the continuance of the hearing before the Tax Court so that the New York proceeding might be brought to a conclusion.

4. The New York court rendered a reasoned opinion and reached a deliberate conclusion.

5. The New York court's decision, which is binding upon Mrs. Bosch, may have certain offsetting tax consequences in respect to her own estate tax. The New York decree establishing that she has a general power of appointment will result in the inclusion in her gross estate of any property passing under her exercise of that power, and the record indicates that it is not reasonable to assume that this power of appointment will remain unexercised.[4] Thus, the state court decree was more than "a label for past events that would affect the present litigation; it authoritatively determined the nature of the power of appointment with potentially adverse tax consequences at a later date."

The Tax Court stated that it was not necessary for it to say that it was "bound" by the New York decision. It held that it was sufficient to state, for all of the above reasons, that it would accept the New York decision "as an authoritative exposition of New

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[4] The Tax Court said "[W]e cannot reasonably assume that she will permit that power to remain unexercised, for there are indications in the record that the immediate natural objects of her bounty do not include all of the many relatives of her husband who would take in default of her exercise of the power."

York law and adjudication of the property rights involved."

In deciding whether the Tax Court ascribed proper effect to the state decision, a few preliminary observations may be helpful. We believe that much of the confusion in the cases is caused by the failure of the courts carefully to formulate the issue. For example, it is quite clear that the state decision is not binding upon the federal courts because the situation is covered by the principle of *res judicata*. See *Freuler* v. *Helvering*, 291 U.S. 35, 43 (1934). Obviously the Commissioner is not bound by the state decision in a *res judicata* sense, since he was not a party to the litigation which resulted in the decision. It may be that it would be desirable to hold the Commissioner bound when he has received notice and an opportunity to appear as in this case, but that is clearly not the law now, and any such change in the law would no doubt require legislative action. Similarly the federal courts are not bound in this situation by the rule of *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). It is for this reason that most of the Commissioner's argument must be considered to be beside the point. The task here is not to discover the general New York law applicable to releases of powers of appointment. That may well be the subject of the required search in a case which concerns a taxpayer whose own special status under New York law has never been authoritatively determined by a New York tribunal. In the determination of the present case we are not required to take issue with our learned colleague, Judge Friendly, whose brilliant lecture *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. Rev. 383 (1964) is quoted in the Commissioner's Reply Brief. We may indeed agree with him that the

correct view, that "the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law," is set forth by Judge Waterman in *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.*, 234 F. 2d 538, 541 n. 1 (2d Cir. 1956). The reference in the quoted passage is to the great run of cases in which the federal courts are obliged to search out the general principle of state law in order to apply that principle to a case under consideration. It does not refer, and was never intended to refer, to the question of whether or not a federal court is to accept a state determination of the rights under state law of a party to a federal action. In the latter situation, which is that in the case at bar, the party comes into the federal court with his rights already fixed by a decision of a state tribunal. There is no occasion to inquire into the general law of the state to ascertain what those rights are.

The issue is, then, strictly speaking, not whether the federal court is "bound by" the decision of the state tribunal, but whether or not a state tribunal has authoritatively determined the rights under state law of a party to the federal action.

This is clearly the effect of *Sharp* v. *Commissioner*, 303 U.S. 624 (1938), reversing, 91 F. 2d 802 (3d Cir. 1937), *Blair* v. *Commissioner*, 300 U.S. 5 (1937) and *Freuler* v. *Helvering*, 291 U.S. 35 (1934). In the *Blair* case, the issue was whether a certain trust was a spendthrift trust under the law of Illinois. The Circuit Court of Appeals, examining the general law of Illinois on the subject, held it to be a spendthrift trust. The trustees thereupon brought an action in the Illinois courts to obtain a construction of the will and the Appellate Court of Illinois, an intermediate appellate court, held that the trust was not a spend-

thrift trust. The United States Supreme Court ruled that the Commissioner was required to accept the Illinois decision as dispositive. The Court said:

> "In this instance, it is not necessary to go beyond the obvious point that the decision was in a suit between the trustees and the beneficiary and his assignees, and the decree which was entered in pursuance of the decision determined as between these parties the validity of the particular assignments." 300 U.S. at 10.

In deciding whether the determination of the rights under state law of a party to a federal action has been authoritative, the majority of federal courts in which the question has been raised have refused to accept the result in cases which were non-adversary.[5] However, there is very respectable authority for the proposition that, if the state decision is binding on the parties as to their rights under state law (as it would not be if it resulted from fraud or collusion), it is conclusive as to those rights for purposes of federal

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[5] See the discussion and the cases cited in the following: 10 Mertens, *Law of Federal Income Taxation*, Ch. 61 (Zimet Revision 1964); Braverman and Gerson, *The Conclusiveness of State Court Decrees in Federal Tax Litigation*, 17 Tax L. Rev. 545 (1962); Colowick, *The Binding Effect of a State Court's Decision in a Subsequent Federal Income Tax Case*, 12 Tax L. Rev. 213 (1957); Holzman, *Impact of State Law upon Fed. Tax.*, 42 Taxes 240 (1964); Sacks, *Binding Effect of Nontax Litigation in State Courts*, N.Y.U. 21st Inst. on Fed. Tax., 277 (1963); Stephens & Freeland, *The Role of Local Law and Local Adjudication in Federal Tax Controversies*, 46 Minn. L. Rev. 223 (1961); Note, *Binding Effect of a Nonadversary State Court Decree in a Federal Tax Determination*, 33 Fordham L. Rev. 705 (1965); Note, *Effect of State Court Decrees in Federal Tax Litigation*, 30 U. of Chi. L. Rev. 569 (1963); Note, *The Role of State Law in Federal Tax Determination*, 72 Harv. L. Rev. 1350 (1959).

taxation. In *Gallagher* v. *Smith*, 223 F. 2d 218, 223 (3d Cir. 1955), the court said:

> "An adjudication of such a question of title by a court of the state must accordingly be given effect, not because it is res judicata against the United States, but because it is conclusive of the parties' property rights which alone are to be taxed. So far as those parties are concerned the law of the state is what the state court has declared and applied in their case. If the state court's judgment has binding final effect under the state law the rights of the parties can only be what the court has held them to be. It is for this reason that the federal court should not in a case of this kind make an independent examination and application of state law. For if it reaches a different conclusion from the state court as to what the parties' rights should be under the state law its decision will not change those rights which will necessarily remain what the state court has declared them to be."

See *Flitcroft* v. *Commissioner*, 328 F. 2d 449 (9th Cir. 1964); *Estate of Darlington* v. *Commissioner*, 302 F. 2d 693 (3d Cir. 1962); *Eisenmenger* v. *Commissioner*, 145 F. 2d 103 (8th Cir. 1944); *Sharpe* v. *Commissioner*, 107 F. 2d 13 (3d Cir. 1939), cert. denied, 309 U.S. 665 (1940).

It may fairly be said, we think, that the question is an open one in this circuit. (However, compare *Kelly's Trust* v. *Commissioner*, 168 F. 2d 198 (2d Cir. 1948).) The decision in *Second National Bank* v. *United States*, 351 F. 2d 489 (2d Cir. 1965), was based, as the court makes clear,[6] on the holding that the de-

[6] "The trial court after carefully considering the arguments and the many relevant decisions concluded that 'the decrees of the Connecticut Probate Court—which is not a court of record and most of the judges of which are laymen, not lawyers—

termination of the Connecticut Probate Court was not authoritative in Connecticut.

An able Tax Court judge quite explicitly undertook to balance several relevant factors (see pp. 2494–2495 *supra*) before deciding to accept the New York judgment as authoritative of the rights of parties. We, too, have considered all of the circumstances and feel that the decision below was correct. We hold that the New York judgment, rendered by a court which had jurisdiction over parties and subject matter, authoritatively settled the rights of the parties, not only for New York, but also for purposes of the application to those rights of the relevant provisions of federal tax laws. Mrs. Bosch now has a general power of appointment under the trust. The corpus of the trust therefore qualifies for the marital deduction.

The decision of the Tax Court is affirmed.

FRIENDLY, Circuit Judge (dissenting):

The Commissioner's appeal concerns an important problem in the administration of the revenue laws—the conclusiveness of a judgment of a lower state

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under no circumstances can be construed as binding and conclusive upon a federal court in construing and applying the federal revenue laws.' 222 F. Supp. at 457. This court is in accord with the trial court's conclusion as to the effect of the state decree, see *Estate of Peyton* v. *Commissioner*, 323 F. 2d 438 (8th Cir. 1963), since under Connecticut law the Probate Court's decisions are not binding on the state's higher courts, *Heiser* v. *Morgan Guaranty Trust Co.*, 150 Conn. 563, 192 A. 2d 44 (1963), and are even subject to collateral attack in another probate district, Culver's Appeal from Probate, 48 Conn. 165, 172–174 (180). Under the circumstances, it was necessary 'to make a finding as to whether the proceedings in the Probate Court were collusive or nonadversary in nature' and the court properly refrained from so doing." 351 F. 2d at 494.

court, typically in an intra-family setting, that determines property interests entailing federal tax consequences. The Supreme Court has not spoken to the point for nearly thirty years. Difficulties arise because of the practical unacceptability of the strictly logical polar positions; that the judgment of an inferior state court not binding as *res judicata* can never be more than rebuttable evidence of state law, and that any such judgment which is effective as a determination of property rights among the parties is conclusive upon the federal fisc. The former position could operate unfairly in the many cases where persons having a genuine controversy over property rights desire resolution by an appropriate local tribunal without wishing to press their differences to the highest court of the state. The latter would permit citizens, unwilling to accept the tax consequences of actions taken by them or their decedents, to evade federal taxes by taking advantage of an unwitting lower state tribunal.

The compounding of factual variables, the somewhat intractable nature of the problem, and the cryptic character of the Supreme Court's rather dated pronouncements, see *Freuler* v. *Helvering,* 291 U.S. 35, 43–47 (1934); *Blair* v. *C. I. R.,* 300 U.S. 5, 9–10 (1937); and *Sharp* v. *C. I. R.,* 303 U.S. 624 (1938), have created widespread conflict among the circuits. *Contrast,* e.g., *Saulsbury* v. *United States,* 199 F. 2d 578 (5 Cir. 1952), cert. denied, 345 U.S. 906 (1953); *Stallworth's Estate* v. *C. I. R.,* 260 F. 2d 760 (5 Cir. 1958); *Sweet's Estate* v. *C. I. R.,* 234 F. 2d 401 (10 Cir.), cert. denied, 352 U.S. 878 (1956); and *Faulkerson's Estate* v. *C. I. R.,* 301 F. 2d 231 (7 Cir.), cert. denied, 371 U.S. 887 (1962), refusing to give effect to state judgments, *with Gallagher* v. *Smith,* 223 F. 2d

218 (3 Cir. 1955); *Darlington's Estate* v. *C. I. R.*, 302 F. 2d 693 (3 Cir. 1962), and *Goodwin's Estate* v. *C. I. R.*, 201 F. 2d 576 (6 Cir. 1953), doing the opposite. The Fourth Circuit has declined to give effect to a lower state court judgment with a respect to a widow's power of appointment rendered under circumstances quite similar to those here, *Pierpont's Estate* v. *C. I. R.*, 336 F. 2d 277, 281–82 (1964), cert. denied, 380 U.S. 908 (1965), distinguishing its earlier decision in *Pitts* v. *Hamrick*, 228 F. 2d 486 (1955), and expressly refusing to follow the rule of the Third Circuit which my brothers adopt. The Eighth Circuit seems to be less deferential to state judgments now than it used to be. *Contrast Straight's Trust* v. *C.I.R.*, 245 F. 2d 327 (1957) and *Peyton's Estate* v. *C. I. R.*, 323 F. 2d 438 (1963), *with Helvering* v. *Rhodes' Estate* 117 F. 2d 509 (1941); and *Eisenmenger* v. *C. I. R.*, 145 F. 2d 103 (1944). The Ninth Circuit appears to be more so. *Contrast Flitcroft* v. *C. I. R.*, 328 F. 2d 449 (1964), *with Newman* v. *C. I. R.*, 222 F. 2d 131 (1955), and *Wolfsen* v. *Smyth*, 223 F. 2d 111 (1955). The conflict among the judges is echoed among the commentators. Most of them disapproved the acquiescent attitude now identified with the Third Circuit. See, e.g., Cardozo, Federal Taxes and the Radiating Potencies of State Court Decisions, 51 Yale L. J. 783 (1942); Cahn, Local Law in Federal Taxation, 52 Yale L. J. 799, 818–19 (1943); Oliver, The Nature of the Compulsive Effect of State Law in Federal Tax Proceedings, 41 Calif. L. Rev. 638 (1953); Stephens and Freeland, The Role of Local Law and Local Adjudications in Federal Tax Controversies, 46 Minn. L. Rev. 223, 242–51 (1961); Braverman & Gerson, The Conclusiveness of State Court Decrees in Federal Tax Litigation, 17 Tax L.

Rev. 545 (1962); Note, Effect of State Court Decrees in Federal Tax Litigation: A Proposal for Judicial Reform, 30 U. Chi. L. Rev. 569 (1963); Sacks, The Binding Effect of Nontax Litigation in State Courts, N.Y.U. 21st Inst. on Fed. Tax. 277 (1963). But the Third Circuit also has a defender. See Note, The Binding Effect of a Nonadversary State Court Decree in a Federal Tax Determination, 33 Fordham L. Rev. 705 (1965). With our own court uncommitted,[1] I regret my brothers' vote to align themselves with the rather mechanical view of the Third Circuit rather than the more realistic one of the Fourth and Fifth, thereby needlessly handicapping the Commissioner in the fair and equal enforcement of the federal revenue laws. I would hold that when it is evident that state court litigation has been brought primarily to have an effect on federal taxes, the judgment of an inferior state court adjudicating property rights is entitled to little weight, and that when the state court has not had the benefit of a fair presentation of both sides of the controversy, it is entitled to none. While these principles will not resolve all cases, they are ample to decide this one.

When Herman Bosch died in 1957, the critical date for determining taxes on his estate, his wife had only a special power of appointment over the trust whose status is here in question. Admittedly this was all she purported to have and all she or her husband thought she had. So long as Mr. Bosch lived, no one

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[1] The decision in *Kelly's Trust* v. *C. I. R.*, 168 F. 2d 198 (2 Cir. 1948), is inapposite in my view since the deference given to the state court adjudication was on the basis that its "appeal made it adversary, . . . especially as, on appeal from the state-court judgment, one judge dissented." 168 F. 2d at 198–99.

had questioned the validity of the partial release of the quondam general power, least of all the experienced attorneys who had recommended it. Nor was there any basis for doing so. There had indeed been New York decisions that a power of appointment by will, whether or not contingent on the donee's surviving the donor, could not be released since this would defeat the purpose of preserving the donee's freedom of action until death. *Learned* v. *Tallmadge,* 26 Barb. 443 (1856); *Farmers' Loan and Trust Co.* v. *Mortimer,* 219 N.Y. 290 (1916). But, upon enactment of the Revenue Act of 1942, thenceforth taxing all property subject to a preexisting general power of appointment unless this was released by a specified date,[8] New York's legislature moved swiftly to permit holders to rid themselves of such powers in whole or in part. The statute, Real Property Law § 183, was phrased in the broadest terms:

> "Any power which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, other than a power in trust which is imperative, is releasable * * * with respect to the whole or any part of the property subject to such power and may also be released in such manner as to reduce or limit the persons or objects, or classes of persons or objects, in whose favor such power would otherwise be exercisable."

Nothing in the language suggests a desire to except powers that were, like Mrs. Bosch's, contingent on the

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[8] Initially this was January 1, 1943, 56 Stat. 944. Later Congress successively granted postponements until November 1, 1951, and made clear that a partial release would qualify. See Powers of Appointment Act of 1951. 65 Stat. 91; S. Rep. No. 382, 82d Cong., 1st Sess. 2–8, 1951 U.S. Code Cong. & Ad. News 1530–37; Int. Rev. Code of 1954, § 2041(a)(1).

donee's surviving the settlor or destructible by the settlor's amending or revoking the trust;[9] "exercisable" would not normally be read as including only cases where the exercise would be effective if the donee died the next minute. And there was no reason why New York's legislature should thus fail in part to enable its citizens to do what Congress contemplated they might. Unless such a contingent power was partially released before the end of the grace period accorded by Congress, the settlor's death would leave the donee in the same unenviable position as any other holder of a general power created on or before October 21, 1942, where any exercise, although in favor of persons other than the donee, his estate, or their creditors, would result in the inclusion in his estate of the property over which he held the power—just what the release here suggested by the trustee in October 1951 was meant to avoid. Since there is no apparent reason why the New York legislature should have wished to discriminate against holders of contingent or revocable powers and the language affords no indication that it did, it is not surprising that what appears to be the only New York case raising the problem in a truly adversary context held that the contingent nature of a power of appointment, in that instance upon death of the donee without issue, did not prevent release under § 183, *In re Woodcock's Will,* 19 Misc. 2d 268, 186 N.Y.S. 2d 447,

[9] We have been cited to no New York cases that had ever drawn this distinction. The one New York case cited by the Supreme Court Justice, *In re Piffard*, 111 N.Y. 410 (1888), held that although a power of appointment granted by will could not have been exercised as such by a donee who predeceased the testator, the latter's will should be read as incorporating the legatee's disposition.

450 (Surr. Ct. Westchester Co. 1959).[10] This was the unpropitious background in which the attorneys who had counseled that Mrs. Bosch convert her general power into a special one in 1951 determined to engage in what the Commissioner has aptly characterized as *post mortem* estate planning, regaining for her through the New York courts a general power she no longer had at Mr. Bosch's death.

The only reason advanced by the trustee for seeking a declaration as to the validity of the release was the effect on the trust's liability for its share of the taxes on Mr. Bosch's estate—allegedly only $930 if the release was not valid but $21,479 if it was. The trustee's petition to the New York court gave no reason why determination of that question by the Tax Court in the litigation there pending would not fully protect it. The brief for Mrs. Bosch, joining in the trustee's request that the release be declared invalid, made no suggestion that she desired to avail herself of the released power to appoint by will to herself, her estate or her creditors. Indeed, her regaining the general power made it less likely that she would exercise it in any respect. Under the Internal Revenue Code of 1954, § 2041(a)(1), while

[10] Any shadow of doubt has been dissipated by § 146 of the new Article 5 of the Real Property Law, added by Laws 1964, c. 864, effective June 1, 1965, which was not called to the attention of the Tax Court—or to us. This section provides that the donee of a power not presently exercisable cannot contract to make an appointment but "the provisions of this section shall not, in any way, abridge the ability of the donee of a power of appointment not presently exercisable, to release his power, in whole or in part, pursuant to the provisions of section one hundred and forty-three * * *" Section 143 is old § 183. It is thus apparent that no other New Yorker in Mrs. Bosch's situation can ever obtain a ruling like that made here.

any exercise of the power would cause the trust property to be included in her estate, failure to exercise it would produce the optimum result of availability of the trust property for the marital deduction in Mr. Bosch's estate and freedom from taxation in his widow's—a feat which could not have been accomplished by revocation of the trust during Mr. Bosch's life. In default of appointment the trust was to be divided equally between the then next of kin of the two spouses; the interest of the many persons cited as presumptive remaindermen, taken as a class, thus also favored a declaration of invalidity which would make exercise in favor of Mrs. Bosch's relatives less likely, as was conceded in the brief filed by a guardian *ad litem* for a relative of Mr. Bosch, the only remainderman to take a position. Mrs. Bosch in no way indicated that if the release was held valid, she would exercise her special power in favor of any particular person, who might thus be interested in urging validity. The briefs, filed by the trustee, Mrs. Bosch and the guardian, treated the invalidity of the release as almost beyond reasonable debate. The attorneys for the trustee did not inform the court on what basis they had recommended action in 1951 which they now considered so plainly a nullity—something as to which they would have been questioned sharply in a truly adversary proceeding. The sole relevant authority, *In re Woodcock's Will, supra,* was not cited, and the legislative purpose behind § 183 was not explored. Under these circumstances it is not to be wondered that a judge sitting in the busy motion part of the Supreme Court for New York County should have erroneously ratified the parties' unanimous contention, citing only the inapposite decision in *In re Piffard,* see n. 3.

The case thus fits perfectly the description cited by way of contrast in *Freuler* v. *Helvering, supra,* where "all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional * * * tax." 291 U. S. at 45. The problem in this area has been bedeviled by iteration of terms such as "collusive" or "non-adversary." To require proof of collusion in the normal sense of prearrangement would impose a nigh impossible burden on the Commissioner; yet a court shrinks from using such an opprobrious epithet when no prearrangement has been shown. Again, while a proceeding in which, for example, a life tenant with what appears to be a limited right to invade principal seeks a declaration of absolute ownership is surely "adversary" in a formal sense, it may not be in a practical one, as when the life tenant is an aged mother seeking to qualify a bequest for the marital deduction and the remaindermen are her adult sons. See *Peyton's Estate* v. *C. I. R., supra,* 323 F. 2d 438. What makes this case so easy is that the state court proceeding had no significant purpose other than the reduction of tax liability; Mrs. Bosch was not shown to have the slightest intention of using the general power the New York court was led to thrust upon her, or even the special one if she was held to have only that. In a practical sense the decision was thus devoid of any effect except on taxes.[11] There was no

[11] It is immaterial that if Mrs. Bosch should choose to exercise the power in favor of her own relatives, she would subject her estate to a tax—apparently much smaller than the sum here at issue—which would have been saved if the release had not been attacked. The *post mortem estate* planning condemned in *Pierpont's Estate* v. *C. I. R., supra,* 336 F. 2d 277, and *Peyton's Estate* v. *C. I. R., supra,* 323 F. 2d 438, would also have increased the estate tax payable on the widow's death.

question affecting the integrity of the corpus, as in *Freuler,* or the assignability of the beneficiary's right to income, as in *Blair* v. *C. I. R., supra.* In such a case the considerations for respecting the determination of a lower court which is not the product of a weighing of opposing arguments approach zero.[12] One well-considered article has said: "Whenever all parties to the state court proceeding approve and have never opposed the proffered result, and the decree embodying it appears to serve no purpose other than to avoid federal taxation, the decree should not be regarded as determinative of the state law property rights purportedly adjudicated." Braverman & Gerson, *supra,* 17 Tax L. Rev. at 576. Another comment suggests that "If a taxpayer, intending to avoid tax liability, institutes a state suit, and if no interested party presents the argument urged by the Commissioner, then the state court judgment should be considered to have been collusively obtained." Note, *supra,* 30 U. Chi. L. Rev. at 581. A third proposes that a state court adjudication of property rights be respected "unless it was obtained by collusion, i.e.,

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[12] I fail to see the significance attributed by my brothers to the Commissioner's knowledge of the New York proceeding or his courtesy in awaiting its outcome. For twenty years the announced policy of the Internal Revenue Service, surely well known to the appropriate committees of Congress, has been not to intervene in such suits and to move to dismiss if made a party. Mim. 6134 (1947). The reasons are obvious—insufficient staff, unfamiliarity with state procedures, and lack of standing to intervene and thus to appeal unless, indeed, the Commissioner were to concede the very point of the conclusiveness of the state judgment which he properly disputes. In the absence of contrary congressional direction the United States is entitled to litigate liability for federal taxes in its own courts. Compare *Leiter Minerals, Inc.* v. *United States,* 352 U.S. 220 (1957).

for the sole and single purpose of defeating the federal tax imposed upon those rights." Sacks, *supra*, N.Y.U. 21st Inst. on Fed. Tax. at 295. It is unnecessary to choose among these formulations; all call for reversal here.

JUDGMENT

United States Court of Appeals, Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of July one thousand nine hundred and sixty-six.

Present: Hon. HENRY J. FRIENDLY, Hon. PAUL R. HAYS, Hon. WILFRED FEINBERG, Circuit Judges.

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR, RESPONDENT

Appeal from The Tax Court of the United States

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

A true copy,
/s/ A. Daniel Fusaro,
Clerk.

APPENDIX B

Internal Revenue Code of 1954:

SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

(a) *Allowance of Marital Deduction.*—

For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) *Limitation in the Case of Life Estate or Other Terminable Interest.*—

(1) *General rule.*—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest.

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

* * * * *

(5) *Life estate with power of appointment in surviving spouse.*—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * * * *

(c) *Limitation on Aggregate of Deductions.*—

(1) *General rule.*—The aggregate amount of the deductions allowed under this section (computed without regard to this subsection) shall not exceed 50 percent of the value of the ad-

justed gross estate, as defined in paragraph (2).

* * * * *

(d) *Disclaimers.*—

* * *

(2) *By any other person.*—If under this section an interest would, in the absence of a disclaimer by any person other than the surviving spouse, be considered as passing from the decedent to such person, and if a disclaimer of such interest is made by such person and as a result of such disclaimer the surviving spouse is entitled to receive such interest, then such interest shall, for purposes of this section, be considered as passing, not to the surviving spouse, but to the person who made the disclaimer, in the same manner as if the disclaimer had not been made.[1]

(e) *Definition.*—For purposes of this section, an interest in property shall be considered as passing from the decedent to any person if and only if—

(1) such interest is bequeathed or devised to each person by the decedent;

(2) such interest is inherited by such person from the decedent;

(3) such interest is the dower or curtesy interest (or statutory interest in lieu thereof) of such person as surviving spouse of the decedent;

(4) such interest has been transferred to such person by the decedent at any time;

(5) such interest was, at the time of the decedent's death, held by such person and the decedent (or by them and any other person) in joint ownership with right of survivorship;

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[1] Section 2056(d)(2) was amended by P.L. 89-621, which became law on October 4, 1966. See fn. 5, *supra*, p. 10.

(6) the decedent had a power (either alone or in conjunction with any person) to appoint such interest and if he appoints or has appointed such interest to such person, or if such person takes such interest in default on the release or nonexercise of such power; or

(7) such interest consists of proceeds of insurance on the life of the decedent receivable by such person.

Except as provided in paragraph (5) or (6) of subsection (b), where at the time of the decedent's death it is not possible to ascertain the particular person or persons to whom an interest in property may pass from the decedent, such interest shall, for purposes of subparagraphs (A) and (B) of subsection (b)(1), be considered as passing from the decedent to a person other than the surviving spouse.

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SUPREME COURT, U. S.
FILED
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No. 673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF HERMAN J. BOSCH, Deceased,
IRVING TRUST COMPANY, Executor,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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New York, New York 10004.

DERMOD IVES,
JOHN A. CLARK,
WILLIAM H. PRATT,
Of Counsel.

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BRIEF OF RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The respondent opposes the granting of the Petition for a Writ of Certiorari.

Question Presented

Where a party comes into the federal court with his rights already fixed by a State tribunal of the highest original jurisdiction, whose decision has precedent value throughout the State and is reported, is the federal court justified in accepting it as an authoritative determination of the law?

Reasons for Dismissing the Petition

The decision in the court below is in accordance with two decisions of this Court which have been established for nearly 30 years. *Blair* v. *Commissioner*, 300 U. S. 5, *Freuler* v. *Helvering*, 291 U. S. 35. In *Blair*, this Court held that a federal court deciding an issue governed by State law should follow the decision of a State intermediate appellate court where that court, having "reviewed the decisions of the Supreme Court of the State," "reached a deliberate conclusion. To derogate from the authority of that conclusion and of the decree it commanded, so far as the question is one of state law, would be wholly unwarranted in the exercise of federal jurisdiction" (p. 10). While in the instant case the dissenting judge in the court below felt that the case law cited by the State court was "inapposite", the State court was of a contrary opinion. There is no suggestion in *Blair* that the State court must come out the same way the federal court would. Indeed in *Blair* the Circuit Court of Appeals, in its first decision, had come to a different conclusion as to Illinois law than later did the Appellate Court of Illinois.

In *Freuler*, this Court declared that the decision of the State court established "the law of California respecting distribution of the trust estate. It is none the less a declaration of the law of the State because not based on a statute, or earlier decisions. The rights of the beneficiaries are property rights and the court has adjudicated them. What the law as announced by that court adjudges distributable is, we think, to be so considered in applying §219 of the Act of 1921" (p. 45).

1. The petitioner incorrectly characterizes the rationale of the decision in the court below as a holding that where

the taxpayer has had his property rights determined in a State court proceeding, the federal court is conclusively bound by that determination (Pet. for Cert., p. 4). However, the court below quite properly stated that the issue is *not* "whether the federal court is 'bound by' the decision of the state tribunal, but whether or not a state tribunal has *authoritatively* determined the rights under state law of a party to the federal action" (App. to Pet. for Cert., p. 23) (emphasis added).

The court below distinguished its prior decision in *Second National Bank* v. *United States*, 351 F. 2d 489 (C.A. 2), *petition for cert. filed*, 35 U.S.L. Week 3004 (U. S. June 16, 1966) (No. 240), as involving a decree of the Connecticut Probate Court which was not authoritative in Connecticut. The decree of the Connecticut Probate Court did, however, determine the taxpayer's rights.[1]

The petitioner goes on to cite, (Pet. for Cert., p. 7), the statement of the court below that "[t]here is no occasion to inquire into the general law of the state to ascertain what those rights are" (App. to Pet. for Cert., p. 23), as holding that *any* judgment of an inferior State court which is effective as a determination of property rights is conclusive upon a federal court. In view of the pains taken by the court below to distinguish its prior decision in *Second National Bank*, the petitioner has simply misstated the holding.

The petitioner also states that the court below held that it was bound "without regard to whether that decision • • • was incorrect under State law" (Pet. for Cert., p. 4). This is incorrect. The court below made no finding that the decision of the State court was incorrect. In-

1. The collateral attack in *Culver's Appeal from Probate*, 48 Conn. 165, 172-174, cited by the court below in its footnote 6 (App. to Pet. for Cert., p. 26), involved the jurisdiction of a probate court.

stead, the court below held the decision of the Tax Court to be correct (App. to Pet. for Cert., p. 26). And, as the petitioner correctly states (Pet. for Cert., p. 4), the Tax Court accepted the State court's decision as an authoritative exposition of State law.

What the court below held was that when a taxpayer's rights are authoritatively[2] determined by a State court and that determination has value as a precedent and is not contrary to decisions of the State's higher courts, it is to be followed by the federal courts.

Therefore, since the decision below is fully sustained on the holdings of *Blair* and *Freuler*, there is no occasion to reach the issue of whether any determination of the rights of a taxpayer by a State Court is binding on a

2. Judge Friendly questions the authority of the decision of the New York Court in the light of *In re Woodcock's Will*, 19 Misc. 2d 268, 186 N. Y. Supp. 2d 447 (Surr. Ct. Westchester Co.) and Section 146 of the new Article Five of the New York Real Property Law (App. to Pet. for Cert., pp. 31, 32). However, *Woodcock* involved a power of appointment which was exercisable at the time of the partial release because it was a vested interest in a testamentary trust (though subject to defeasance). In the instant case, the power was not exercisable at the time of the purported release for two reasons. The first was that the power was expressly not made exercisable until the death of the grantor. The second was that the trust could have been amended or revoked by the grantor. Because of both of these restrictions on exercise, the power in the instant case resembled the power created in the will of a person who survived the donee in *Matter of Piffard*, 111 N. Y. 410, 18 N.E. 718 (1888). In addition, the court in *Woodcock* recognized that its finding was unnecessary to the decision in that case. Section 146 does make it clear that Section 143 is to be construed to allow the release of powers not presently exercisable. However, Section 143 is a revised version of old Section 183. The wording was changed from "Any power *which is* exercisable * * *" to "Any power, *whether* exercisable * * *" (emphasis added). The fact that the legislature found it necessary to so revise the wording of old Section 183 in making a general revision of the statute dealing with powers is equally open to the interpretation that the legislature recognized that the Section was not originally intended to apply to powers until they were exercisable.

federal court. Accordingly, the petition is based primarily on a rationale of the decision of the court below which is incorrect and is, in any case, unnecessary to support its holding and which therefore does not call for review.

2. On October 4, 1966, P.L. 89-621, 80 Stat. 872 was signed into law. This amendment to §2056(d)(2), Internal Revenue Code of 1954, allows a marital deduction for property passing to persons other than the spouse if disclaimed before the due date of the return and before any property is accepted under the disclaimed interest. This provision is made applicable to estates of decedents dying prior to the enactment of the bill where the due date of the estate tax return is on or after January 1, 1965, with certain limitations.

Had this law been in effect at the death of the decedent in the instant case, it would have been possible for those persons who will take in default of appointment by the decedent's spouse to disclaim any interest in the trust assets and allow the decedent's spouse a general power of appointment, even assuming that the purported partial release was effective. The instant case would not thus have arisen.

It is significant that of the twenty-one cases cited by the petitioner, nine of them involve the amount allowable as a marital deduction.[3]

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3. *Jackson* v. *United States*, 376 U. S. 503; *Old Kent Bank and Trust Co.* v. *United States*, 362 F. 2d 444 (C.A. 6); *Second National Bank* v. *United States*, *supra*, p. 3; *Pierpont's Estate* v. *Commissioner*, 336 F. 2d 277 (C.A. 4, *cert. denied* 380 U. S. 908; *Peyton's Estate* v. *Commissioner*, 323 F. 2d 438 (C.A. 8); *Faulkerson's Estate* v. *United States*, 301 F. 2d 231 (C.A. 7), *cert. denied* 371 U. S. 887; *Stallworth's Estate* v. *Commissioner*, 260 F. 2d 760 (C.A. 5); *Babcock's Estate* v. *Commissioner*, 234 F. 2d 837 (C.A. 3; *Sweet's Estate* v. *Commissioner*, 234 F. 2d 401 (C.A. 10), *cert. denied* 352 U. S. 878.

The enactment of P.L. 89-621 should lead to a significant decrease in litigation involving the effect of State court decrees. Even had the asserted conflict between the circuits arisen here, this Court should grant review in an area of continuing importance in the administration of the revenue laws rather than in litigation concerning the qualification of property for the marital deduction.

The net amount of the deficiency involved in the instant case is $11,173.39. The figure of $70,222.04 set forth as the amount of deficiency in the opinion of the court below (App. to Pet. for Cert., p. 18) is the amount of the deduction.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN W. BURKE, JR.,
Attorney for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 673

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Tax Court (R. 18–24) is reported at 43 T.C. 120. The opinion of the court of appeals (R. 48–65) is reported at 363 F. 2d 1009.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1966 (R. 66). By order of Mr. Justice Harlan dated October 4, 1966, the Commissioner's time for filing a petition for a writ of certiorari was extended to November 3, 1966 (R. 67). The petition was filed on October 13, 1966, and was granted on

December 5, 1966 (R. 68). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

When the resolution of an issue in a federal estate tax controversy depends upon the character of a property interest owned or transferred by the decedent and the character of such interest has been determined in a non-adversary State trial court proceeding to which the United States was not a party, is the federal court conclusively bound by that decision even though it is contrary to State law?

STATUTES AND REGULATIONS INVOLVED

The relevant portions of § 2056 of the Internal Revenue Code of 1954 and the pertinent Regulations are set forth in the Appendix *infra*, pp. 39–43.

STATEMENT

Herman J. Bosch, a resident of New York, died on April 6, 1957. He had created a revocable trust in 1930 which, as amended in 1931, directed that the income be paid to his wife during her life and granted her a general power to appoint the corpus by will to any "persons and/or corporations." In the event she failed to exercise that general power of appointment, the trust provided that half the corpus was to go to her heirs and half to decedent's heirs then living. In 1951 (five and one-half years before decedent's death), in an effort to prevent the corpus of the trust from being taxed as part of her gross estate at her death, decedent's wife executed an instrument which purported to release her general power of appointment and to convert it into a special power of

appointment.[1] (R. 4, 27–31, 33–34, 36, 37–38, 39–40.)

Decedent's executor claimed a marital deduction for the value of the *inter vivos* trust ($70,222). This trust would qualify for a marital deduction only if, at the time of decedent's death, his widow had possessed both the right to receive the income from the the trust for her life and a general power of appointment over the trust assets. It would not qualify for the marital deduction if she had only the right to the income plus a special power of appointment. 1954 Code, § 2056(b)(5) (App. *infra*, pp. 39–40). In view of the widow's prior release of her general power of appointment, the Commissioner determined that the *inter vivos* trust corpus did not qualify for the marital deduction.[2] The executor filed a petition in the Tax Court for a redetermination of the resulting deficiency (R. 3–6, 7).

The Tax Court controversy turned on whether the 1951 release by decedent's widow was, as she now

[1] If a person, at the time of his or her death, has a general power of appointment over a trust, the trust assets are included in his or her gross estate. If a person has only a special power of appointment, the trust assets are not included in his or her estate. 1954 Code, § 2041(a).

A general power of appointment for tax purposes is one which allows the holder to appoint to himself, his estate, his creditors, or the creditors of his estate. A power which cannot be exercised in favor of any of these four classes of appointees is a special power of appointment (even though it can be exercised in favor of any other person or corporation). 1954 Code, § 2041(b)(1).

[2] Although the Commissioner disallowed the marital deduction as to the *inter vivos* trust corpus, he allowed the decedent's estate a total marital deduction of $716,688 for other property interests bequeathed to the widow (R. 7).

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claims, invalid—in which case she would have possessed a general power of appointment at the time of her husband's death in 1957, and the trust would qualify for the marital deduction. While the Tax Court proceeding was pending, decedent's executor-trustee filed a petition in the New York Supreme Court seeking a determination of the validity of the widow's 1951 release. The Tax Court, with the Commissioner's consent, continued the Tax Court proceeding (R. 1–2, 23, 41–43).

In the State court action, three briefs were filed—one for the trustee, one for Mrs. Bosch, and one by a guardian *ad litem* on behalf of a minor who was a possible beneficiary in the event Mrs. Bosch died without exercising her power of appointment. All three briefs argued that the release was a nullity. No argument to the contrary was presented to the State court. The court adopted the unanimous position of the parties that the release was a nullity (R. 10–11, 14–15, 45–47).

Without discussing any New York statutes or decisional law, the Tax Court accepted the State trial court decision "as an authoritative exposition of New York law and adjudication of the property rights involved" (R. 24), and allowed the executor a marital deduction for the value of the *inter vivos* trust. In so doing, the Tax Court declined to decide whether it was bound by the New York trial court's decision (R. 24). A divided court of appeals affirmed. The majority held that it was required to accept the State trial court decision, even if that decision resulted from a non-adversary proceeding and was incorrect

under State law (R. 48–58). Judge Friendly, in his dissenting opinion, concluded, after a comprehensive discussion of the problem, that the State trial court was wrong as a matter of New York law in holding that the partial release was a nullity (R. 58–65). He also rejected the "mechanical view" adopted by the majority, under which the erroneous State trial court decision controlled for federal tax purposes despite the facts that (1) the parties to the State proceeding had no "genuine controversy," (2) the State trial court did not have "the benefit of a fair presentation of both sides" of the question, and (3) the "state court litigation [was] brought primarily to have an effect on federal taxes" (R. 58, 60, 64).

INTRODUCTION AND SUMMARY OF ARGUMENT

Many federal tax cases turn on the taxpayer's rights and interests under State law. For example, whether particular property is includible in the decedent's taxable estate generally depends upon whether he owned the property or held some specified interest in it under State law. Similarly, an estate tax marital deduction is allowable for the value of certain property interests which, under the applicable State law, passed from the decedent to his widow at his death.

The question presented by this case—and by the companion *Second National Bank* case (No. 240, this Term, see fn. 6, p. 7 *infra*)—is whether a taxpayer can, by obtaining an erroneous decree from a State trial court in a non-adversary proceeding, bind the Commissioner on such an issue of State property law.

In the typical tax case, there has been no State court determination of the taxpayer's property rights, and it devolves upon the federal court to determine the taxpayer's property interests under State law. In keeping with the Rules of Decision Act, as interpreted by *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, the federal court must search out State law in order to resolve a federal tax question which depends on an issue of State law. This case raises the narrower question—how did Congress intend a property interest to be characterized for federal tax purposes when a State trial court has already determined that question?

I

Since this Court last addressed itself to the effect of a State trial court determination in a subsequent federal tax proceeding more than thirty years ago in *Freuler* v. *Helvering,* 291 U.S. 35,[3] it has been left to the lower federal courts to decide what effect, in the light of *Freuler,* should be given to State trial court determinations of State law issues on which federal tax consequences turn. At least three different positions have emerged in the decisions of the courts of appeals[4]—two of which may be described as "polar" positions.

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[3] *Blair* v. *Commissioner*, 300 U.S. 5, as explained more fully below (p. 23), involves the question of the effect, for federal tax purposes, of a property determination by a State *appellate* court.

[4] The commentators, too, have suggested differing answers to the question of the effect to be given to State court decrees in federal tax controversies. See, *e.g.*, Braverman and Gerson, *The Conclusiveness of State Court Decrees in Federal Tax Litigation*, 17 Tax L. Rev. 545 (1962); Cahn, *Local Law in Fed-*

The first is that any judgment of a State trial or probate court "which is effective as a determination of property rights among the parties is conclusive upon the federal fisc" (R. 58), and the federal courts are precluded from making any examination of the question, even if the State proceeding was non-adversary and reached an incorrect result. That approach, referred to as the *Gallagher* view, has been adopted only by the Third Circuit [5] and, in this case, by the Second Circuit.[6]

The great majority of the courts of appeals have rejected the *Gallagher* rule. Their decisions have reflected two principal approaches, some courts relying in part on both. Some of the decisions have lent support to the other "polar" position—that where federal tax consequences turn on the nature of a property interest held or transferred by a decedent, a State

eral Taxation, 52 Yale L.J. 799 (1943); Cardozo, *Federal Taxes and the Radiating Potencies of State Court Decisions*, 51 Yale L.J. 783 (1942); Colowick, *The Binding Effect of a State Court's Decision in a Subsequent Federal Income Tax Case*, 12 Tax L. Rev. 213 (1957); Holzman, *Impact of State Law upon Federal Taxation*, 42 Taxes 240, 277 (1964); Stephens & Freeland, *The Role of Local Law and Local Adjudication in Federal Tax Controversies*, 46 Minn. L. Rev. 223 (1961); Note, *Federal Court Recognizes State Determination of Property Rights Despite Nonadversity of State Proceeding*, 41 N.Y.U. L. Rev. 1007 (1966); Note, *Binding Effect of a Nonadversary State Court Decree in a Federal Tax Determination*, 33 Fordham L. Rev. 705 (1965); Note, *Effect of State Court Decrees in Federal Tax Litigation*, 30 U. of Chi. L. Rev. 569 (1963); Note, *The Role of State Law in Federal Tax Determination*, 72 Harv. L. Rev. 1350 (1959).

[5] *Gallagher* v. *Smith*, 223 F. 2d 218 (C.A. 3).

[6] A different panel of the Second Circuit refused to follow *Gallagher* in *Second National Bank of New Haven* v. *United States*, 351 F. 2d 489, certiorari granted December 5, 1966, No. 240, this Term.

trial court decision characterizing that interest can never be conclusively binding, since the federal courts are under a duty to make their own determination of the property interest in accordance with State law as determined by the highest court of the State. According to this view, Congress intended federal courts to ascertain the character of a taxpayer's property interests under State law in accordance with the approach of the Rules of Decision Act, 28 U.S.C. 1652, as interpreted by *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, whether or not there has been a prior determination by a State trial court.

Although there is respectable support for the *Erie* approach, we urge an intermediate position—that a federal court is bound by a State trial court decision if it was rendered in an adversary proceeding but is not bound if the State proceeding was non-adversary. This approach is supported by clear indications of Congressional intent, by the pertinent policy considerations, by long-standing Treasury Regulations, by this Court's *Freuler* decision, and by the decisions of a majority of the courts of appeals; it also eliminates the potential unfairness inherent in both polar positions and achieves an appropriate accommodation of the respective roles of the federal and State courts in resolving tax controversies.

1. Persuasive evidence points to the conclusion that Congress did not intend the federal fisc and the federal courts to be bound by non-adversary State trial court decisions in which there was no genuine controversy between the parties and no full and fair presentation of both sides of the issue on which the federal

tax liability turns. For example, Congress specifically provided that only an interest passing from the decedent to his surviving spouse under his will or by operation of law could qualify for the marital deduction and, until the enactment of a recent and limited amendment, even a disclaimer of property by a legatee in favor of the surviving spouse could not serve to increase the marital deduction. 1954 Code, § 2056(d)(2) App. *infra,* pp. 40–41. Congress could not have intended the marital deduction to be augmented if a legatee disguised his disclaimer by participating in a non-adversary State trial court proceeding in which he voluntarily relinquished rather than asserted his rights under the decedent's will.

The legislative history of the marital deduction demonstrates that Congress intended no such anomalous result. The Senate Finance Committee Report recommending enactment of the marital deduction provision states that in ascertaining the property which passed to the widow under the decedent's will, the Commissioner and the federal courts should give "proper regard * * * to interpretations of the will *rendered by a court in a bona fide adversary proceeding.*" S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 4 (1948–1 Cum. Bull. 331, 334) (italics added).

2. The Treasury Regulations have, since 1919, indicated that a taxpayer cannot bind the government by a non-adversary State court decree involving no "active and genuine contest." And the marital deduction Regulations, since their promulgation in 1949, have indicated that the government is not bound by a consent decree, but strongly suggest that it

will be bound by "a decision of a local court upon the merits in an adversary proceeding following a genuine and active contest."

3. This Court's decision in *Freuler* clearly implied that a State trial court proceeding in which "all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax" would not be conclusive for federal tax purposes. Following this lead, six of the eight courts of appeals which have passed on the question have declined to give conclusive effect to erroneous State court decrees that resulted from nonadversary proceedings.

4. The non-adversary rule avoids the potential unfairness that is present under both polar positions. The *Gallagher* rule is unfair because the government is bound by an erroneous State trial court decree resulting from a proceeding to which it was not a party and in which there was no fair presentation of the position it advocates; and because it permits a taxpayer to use busy State trial and probate courts to effect posthumous intrafamily property dispositions aimed at avoiding estate taxes. Under the *Erie* rule, on the other hand, the litigant who vigorously but unsuccessfully asserts a position in an adversary State court proceeding must press that position to the highest State appellate court if he is to foreclose the possibility that a federal court will tax him as if he had won the State proceeding.

The *Gallagher* rule may properly be criticized because it gives too narrow, and the *Erie* rule because it

gives too broad, a role to the federal courts in resolving tax controversies turning on State law issues. The non-adversary rule achieves a salutary accommodation by restricting federal court re-examination of State decrees to those cases in which the State court proceeding was non-adversary, so that there was no real determination on the merits of the State law issue.

II

In the instant case, decedent's estate would be entitled to a marital deduction only if, at the time of his death, his widow had a life estate in the trust plus a general power of appointment over the corpus. 1954 Code, § 2056(b)(5). No marital deduction would be allowed if, at the time of decedent's death, his wife had only a special power of appointment, even if, shortly after his death, all of his heirs conceded to her the additional power necessary to convert her special power into a general power of appointment. For, although she would then have a general power of appointment, she would neither have received it from her deceased husband nor would she have possessed it at the moment of her husband's death, both of which are essential to allowance of a marital deduction.[7] Therefore, decedent's estate should not receive a marital deduction merely because his heirs, in a non-adversary proceeding in which there was no genuine

[7] *Jackson* v. *United States*, 376 U.S. 503, 507–508; see also 1954 Code, § 2056 (a), and (e); S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 10 (1948–1 Cum. Bull. 331, 338). For a recent statutory amendment of limited scope to § 2056(b)(5), see *infra*, p. 16, fn. 14.

controversy and no full and fair presentation of both sides of the issue, obtained a State trial court's ratification of their voluntary relinquishment of powers to the widow.[8]

[8] Of course, an erroneous State court consent decree will be recognized as effecting an actual transfer of ownership of the property from the "losing" litigant to the "winning" litigant, just as a gift from one to the other would have done. Thus any future income from property transferred by an erroneous consent decree would be taxed to the new owner. The question involved in this case is whether the decree will be given *retroactive effect* as a determination that decedent's widow received the property from decedent and owned it "at the moment of her husband's death."

The same type of question can, of course, arise under the income tax laws. For example, if Mr. X owned certain income producing property, the annual income would be taxed to him. If, on January 1, 1967, he made a gift to his son of the property and its 1966 income, Mr. X would nevertheless be taxable on the 1966 income, since he owned the property at the time it was earned. Assume that Mr. X and his son were in business together and that, although there was some question under State law as to whether certain income producing property was owned by X or by his son, X would have prevailed if he had asserted his rights. Instead, when X's son sued him in a State trial court, claiming that he (the son) owned the property, X did not present any substantial defense to the claim, and the court on January 1, 1967, found that the son owned the property and also awarded the 1966 income to the son. Such a voluntary relinquishment of rights by the father should be taxed no differently than a gift, even though the gift has been judicially sanctioned. There is no question that after this decree the son owns the property and all income accruing *thereafter* is taxable to the son, just as it would have been if the father had given the property to the son. However, the federal court should not be precluded by the non-adversary State court decree from finding that the father had actually owned the property during 1966 and that he was taxable on the 1966 income.

ARGUMENT

I

IN DECIDING AN ESTATE TAX CONTROVERSY, A FEDERAL COURT IS NOT BOUND BY AN ERRONEOUS STATE TRIAL COURT DETERMINATION RENDERED IN A NON-ADVERSARY PROCEEDING TO WHICH THE UNITED STATES WAS NOT A PARTY

A. THE *GALLAGHER* RULE

According to the Third Circuit's *Gallagher* rule,[9] which the Second Circuit adopted in the instant case, "a state court's adjudication which is final in its effect upon [State-created property] rights must also be taken as final as to tax matters which depend upon those rights."[10] It is, under this approach, irrelevant whether the State court decision was correct or incorrect and "whether the [State] proceeding was adversary or nonadversary."[11]

The *Gallagher* rule conflicts with the pertinent policy considerations and is contradicted by relevant indications of Congressional intent; it has also been rejected by the long-standing Treasury Regulations, by the majority of the courts of appeals, and is inconsistent with this Court's *Freuler* decision.

1. In following the *Gallagher* rule, the majority opinion in the instant case gave no weight to the fact that all parties to the State trial court proceeding

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[9] See *Gallagher* v. *Smith*, 223 F. 2d 218 (C.A. 3); *Darlington's Estate* v. *Commissioner*, 302 F. 2d 693, 694–695 (C.A. 3); *Beecher* v. *United States*, 280 F. 2d 202, 203–204 (C.A. 3); *Babcock's Estate* v. *Commissioner*, 234 F. 2d 837, 841–842 (C.A. 3).

[10] *Darlington's Estate* v. *Commissioner*, *supra*, p. 694.

[11] *Gallagher* v. *Smith*, *supra*, p. 226.

adopted the same position and urged the same result—the one which would reduce the federal estate tax liability of decedent's estate. Nor did the majority even consider whether the State trial court decision was correct under State law. Instead, it reasoned that when a "party comes into the federal court with his rights already fixed by a decision of a state tribunal * * * [t]here is no occasion to inquire into the general law of the state to ascertain what those rights are" (R. 55).

From the premise that a State court decision fixes the rights of the parties to that action, the *Gallagher* rule draws the conclusion that the Commissioner, who was not a party, is also bound. Yet no persuasive reasoning serves to bridge the gap between premise and conclusion. The doctrine of finality does not supply that bridge. The court below correctly rejected any contention that the State decision binds the Commissioner as *res judicata* (R. 54).[12] It is equally clear that such State court judgments are not entitled to full faith and credit in federal tax actions.[13]

Under the *Gallagher* approach, the federal courts, in resolving tax controversies, are bound by all State court determinations, including those that are con-

[12] In *Frueler* v. *Helvering*, 291 U.S. 35, involving a similar issue as to the effect of a State court decree on a federal tax case, this Court held that the State decree there involved "Obviously * * * had not the effect of *res judicata*, and could not furnish the basis for the invocation of the full faith and credit clause * * *" (p. 43).

[13] As this Court has often held, that principle stands as a national equivalent to local doctrines of *res judicata*. *Riley* v. *New York Trust Co.*, 315 U.S. 343, 349, 356; *Pink* v. *A.A.A. Highway Express*, 314 U.S. 201.

trary to State law and resulted from non-adversary proceedings brought solely to effect post-mortem tax reduction. Thus taxpayers are permitted to manipulate the estate tax burden by obtaining State court approval for what are essentially post-mortem intra-family property dispositions agreed upon by parties with a common interest in minimizing the impact of the federal estate tax. As Judge Friendly noted, the *Gallagher* rule adopted by the majority in the instant case "would permit citizens, unwilling to accept the tax consequences of actions taken by them or their decedents, to evade federal taxes by taking advantage of an unwitting lower state tribunal" (R. 58). Indeed, the lower court's approach necessarily assumes that Congress intended the outcome of a federal tax controversy to be controlled by an erroneous consent decree, issued by a State court at the behest of a decedent's heirs who unanimously joined in urging such decree solely to reduce the estate tax burden. In the many tax cases in which liability turns on the nature of the taxpayer's interest under State law, the effect of the *Gallagher* rule is to permit the taxpayer to eliminate the role of the federal courts in adjudicating federal tax controversies.

2. There is compelling evidence that Congress intended no such result. Congress specifically provided that only an interest passing from the decedent to his surviving spouse could quality for the marital deduction, and, until a 1966 amendment of limited scope, even a disclaimer by a legatee in favor of the surviving spouse could not serve to increase the marital deduction. 1954 Code, § 2056(d)(2) (App. *infra*, pp.

40–41).[14] It would be highly anomalous if this section prohibiting augmentation of the marital deduction by disclaimer could be circumvented by an erroneous, non-adversary State court decree, obtained through the legatee's acquiescence, granting to the surviving spouse property which under State law should have passed to the legatee.

Moreover, the legislative history demonstrates that Congress never intended the collection of federal estate taxes to be frustrated by a non-adversary State court proceeding confirming a post-mortem intra-family rearrangement of property aimed at reducing estate taxes. The 1948 Senate Finance Committee Report recommending enactment of the marital deduction provision states (S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 4 (1948–1 Cum. Bull. 331, 334)):

> If the surviving spouse takes under the decedent's will, the interest passing to her is determined from the will. In this connection proper regard should be given to interpretations of the will rendered by a court in *a bona fide adversary proceeding*. [Italics added.]

3. Long-standing estate tax Regulations require the same conclusion. The marital deduction Regulations have, since their adoption in 1949, indicated that while a consent decree "will not necessarily be accepted" as

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[14] Congress in 1966 amended that section, effective after the years involved in this case. P.L. 89–621, 80 Stat. 872. The amendment generally permits an increased marital deduction in certain limited circumstances where a legatee other than the decedent's widow makes a prompt disclaimer of an interest which has the effect of increasing the bequest of the decedent's widow.

a proper construction of the decedent's will, "a decision of a local court upon the merits in an adversary proceeding following a genuine and active contest * * * will be accepted [if] * * * the court passed upon the facts upon which deductibility of the property interests depends."[15] Treas. Reg. § 20.2056(e)-2(d)(2) (App. *infra*, p. 43).

The same approach is reflected in the Regulations under Code § 2053 which allow an executor to take a deduction against a decedent's gross estate for the decedent's debts. These Regulations have, since 1919, indicated that a State court decree purporting to decide that some one (*e.g.*, a member of the decedent's family) has an enforceable claim against his estate is *not* conclusive on the federal court unless the State court "actually passed upon the merits of the claim, * * * [which] will be presumed in all cases of an active and genuine contest." If, however, the State proceedings were non-adversary and the decree was "a

[15] The Regulations provide that "a decision of a local court upon the merits in an adversary proceeding following a genuine and active contest" will be "presumed" to reflect the "enforceable rights of the surviving spouse in the decedent's estate." However, there is no suggestion that this "presumption" would be overcome in the case of a genuinely adversary State court decision if it were incorrect. In fact, the text of the Regulations clearly indicates the contrary. While, according to the Regulations, a consent decree "will not necessarily be accepted as a bona fide evaluation of the rights of the spouse," the clear implication is that when there has been "a decision of a local court upon the merits in an adversary proceeding following a genuine and active contest, * * * such a decree *will be accepted* * * * to the extent that the court passed upon the facts upon which deductibility of the property interests depends" (emphasis added).

mere cloak for a gift" from the estate to the claimant, the decree "will not be accepted." Treas. Reg. § 20.2053–1(b)(2) (App. infra, pp. 42–43).[16]

4. An early decision of this Court also indicates that the mechanical *Gallagher* approach is incorrect. In *Freuler* v. *Helvering*, 291 U.S. 35, a trustee distributed the gross income of the trust to the life income beneficiaries without any reduction for depreciation. The life beneficiaries failed to report on their tax returns the amount attributable to depreciation, *i.e.*, they reported the amount distributed less the depreciation. The Commissioner asserted a deficiency against them; and, while the case was pending before the Board of Tax Appeals, the trustee sought approval of his accounts from a California trial court. Certain remaindermen filed objections. The State

[16] The Regulations under §§ 2056 and 2053 should be given great weight. Not only have they received congressional approval under the re-enactment doctrine (see, *e.g.*, *Fribourg Nav. Co.* v. *Commissioner*, 383 U.S. 272, 283; *Gammarano* v. *United States*, 358 U.S. 498, 510–511; *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396–397; *Helvering* v. *Winmill*, 305 U.S. 79, 83), but also they involve contemporaneous constructions of statutes by those charged with "setting [their] machinery in motion" and, hence, are entitled to "peculiar weight" (*Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315). The § 2056 Regulation quoted above has been unchanged since it was adopted in 1949, interpreting the marital deduction provision enacted by Congress in the prior year. See Treasury Regulations 105 (1939 Code), Sec. 81.47a(g), as amended by T.D. 5699, 1949–1 Cum. Bull. 181, 202. Congress re-enacted § 2056 in 1954 without disturbing the administrative interpretation it had been given. Similarly, the § 2053 Regulation quoted above was first adopted in 1919—just three years after the modern federal estate tax was enacted. See Treasury Regulations 37 (Rev. 1919), Art. 39. In the intervening years, Congress has re-enacted that section many times without altering the interpretation it had been given.

court found that the amounts representing depreciation should not have been distributed to the life income beneficiaries, and ordered the latter to repay the trustee an amount equal to the depreciation. Congress had provided (in a section of the then applicable Revenue Act, since repealed)[17] that a trust beneficiary is taxed on trust income which, pursuant to the "order governing the distribution, is distributable." This Court held that under this provision a federal court was bound to accept the distribution "order" entered by a State trial court, at least where that judicial proceeding was not "collusive in the sense that all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax" (p. 45).

The instant decision, however, rejects the plain implication of *Freuler,* by holding that a State trial court decision is binding for federal tax purposes even though the State proceedings were both (a) non-adversary and (b) brought to reduce federal taxes.

5. Finally, the majority of the courts of appeals have rejected the *Gallagher* approach. See *In re Sweet's Estate,* 234 F. 2d 401, 404, fn. 2 (C.A. 10), certiorari denied, 352 U.S. 878; *Old Kent Bank & Trust Co.* v. *United States,* 362 F. 2d 444, 449, 450 (C.A. 6); *Pierpont* v. *Commissioner,* 336 F. 2d 277, 281 (C.A. 4), certiorari denied, 380 U.S. 908; *Saulsbury* v. *United States,* 199 F. 2d 578, 580 (C.A. 5), certiorari denied, 345 U.S. 906; *Faulkerson's Estate* v. *United States,* 301 F. 2d 231, 233 (C.A. 7), certiorari denied, 371 U.S. 887; *Stallworth's Estate* v. *Commis-*

[17] Revenue Act of 1921, c. 136, 42 Stat. 227, § 219(d), repealed by Revenue Act of 1924, c. 234, 43 Stat. 253, § 219.

sioner, 260 F. 2d 760, 763 (C.A. 5); *Peyton's Estate* v. *Commissioner,* 323 F. 2d 438, 443–444 (C.A. 8); *Stark* v. *United States,* 351 F. 2d 160, 163 (C.A. 6), certiorari denied, 384 U.S. 939. Compare *Newman* v. *Commissioner,* 222 F. 2d 131, 136 (C.A. 9), and *Wolfsen* v. *Smyth,* 223 F. 2d 111, 113–114 (C.A. 9), with *Flitcroft* v. *Commissioner,* 328 F. 2d 449, 453–454 (C.A. 9).

B. THE *ERIE* VIEW

According to the other "polar" view, the so-called *Erie* approach, the federal courts in tax cases are never bound by a State trial court decree. This view rests on the premise that Congress intended a federal court, faced with a tax case turning on a question of State law, to determine State law in accordance with the Rules of Decision Act, 28 U.S.C. 1652, and *Erie R. Co.* v. *Tompkins,* 304 U.S. 64—that is, the State law question must be decided by ascertaining how the highest court of the State would decide that issue.[18]

As this Court has indicated, a recent decision of a State's highest court provides a rule of decision that federal courts must follow. Compare *Erie R. Co.* v. *Tompkins, supra,* with *Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198, 204–205. State trial court decisions, however, do not necessarily provide such a rule of de-

[18] The Rules of Decision Act and *Erie* apply whether federal jurisdiction is based upon diversity or (as in a federal tax case) upon the presence of a federal question. See Friendly, *In Praise of Erie—And of the New Federal Common Law,* 39 N.Y.U. L. Rev. 383, 408, fn. 122 (1964); *Maternally Yours* v. *Your Maternity Shop,* 234 F. 2d 538, 540–541, fn. 1 (C.A. 2); Hart and Wechsler, *The Federal Courts and the Federal System,* 697 (1953).

cision. *Beals* v. *Hale*, 4 How. 37; *King* v. *Order of Travelers*, 333 U.S. 153. As pointed out by Judge Parker,[19] the function of preserving uniformity in the law as administered throughout a jurisdiction is served by appellate court decisions rather than by trial court decisions to which the doctrine of *stare decisis* is ordinarily inapplicable. The decision of a trial court may conflict with decisions of similar courts of the State and may be contrary to decisions of the State's higher courts.

A State trial court decision does not more accurately reflect State law merely because it binds one of the parties to the federal action. It would be incongruous if an erroneous State trial court decision—which no State court is bound to follow—controlled the outcome of a federal tax controversy and thus bound the federal fisc and the federal courts. Yet the *Gallagher* rule would require such a result.

There is no indication that Congress intended the federal courts in determining tax controversies to be bound by a State trial court decision which (1) is contrary to State law, (2) would have no *stare decisis* effect within the State, and (3) would doubtless have

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[19] Parker, *Erie v. Tompkins in Retrospect: An Analysis of Its Proper Area and Limits*, 35 A.B.A. J. 19, 22 (1949):

"Trial courts exist to administer justice between litigants, appellate courts to preserve uniformity in the law as administered throughout the jurisdiction. A decision of the trial court means nothing more than that the trial judge thinks the law to be as he has declared it, and no other judge is bound to follow his decision. A decision of an appellate court means that the law as declared by it is settled and declared for the territory for which it has jurisdiction and must be followed by all courts within that territory until overruled or reversed."

been reversed if an appeal had been taken. The statement in the Senate Finance Committee Report on the marital deduction provision, *supra,* pp. 16–17, simply requires that "'proper regard'' be given to a decree entered in "a bona fide adversary proceeding." According to the *Erie* rule, "proper regard'' would be given to a litigated State trial court decision by treating it as some indication of how the highest State court would decide that issue, but it could not preclude the federal courts from making any inquiry at all into whether that decision was in accord with the law of the State as determined by the highest State court.

Thus, the Seventh Circuit in *Brainard* v. *Commissioner,* 91 F. 2d 880, in a federal tax case, expressly held that it was not bound by a State trial court decree, stating (pp. 883–884):

> Appellant * * * has presented to us a duly authenticated decree of the circuit court of Cook county, Illinois, in a case wherein this appellant filed his complaint in chancery, against his wife and mother, for the construction of this trust with respect to the question now before us. * * * With due deference to that court, however, we cannot accept the ruling as an expression of the judgment of the state of Illinois as to the property rights of her citizens in the interpretation of the local laws. That court's jurisdiction is limited to Cook County, and there are close to a hundred other circuit courts in Illinois of equal jurisdiction which are not bound by the rulings of the Cook county circuit court. For the interpretation of the laws of Illinois, we must look to the de-

> cisions of the Supreme and Appellate Courts of that state, for their rulings are binding upon all the inferior courts of Illinois.
>
> It is no doubt true that the proffered decree is binding upon the parties to that suit, and it will not be appealed from, because all parties thereto are satisfied with it; but we think it can not be binding on the government, which was not a party, and which of course has no right of appeal.

This Court's decision in *Blair* v. *Commissioner,* 300 U.S. 5, decided before *Brainard,* is not inconsistent with the *Erie* approach. In that federal tax proceeding, the federal court was required to follow a decision obtained by a taxpayer from a State intermediate appellate court which had, as this Court emphasized, "reviewed the decisions of the Supreme Court of the State and reached a deliberate conclusion" (p. 10).

We acknowledge that, with the possible exception of the *Brainard* case, no federal court of appeals has actually adopted the *Erie* rule. Most of the courts of appeals that have declined to attribute conclusive effect to State court decrees appear to have done so primarily, and certainly with considerable emphasis, on the ground that the decrees resulted from non-adversary proceedings in which both sides of the crucial issue were not fairly presented to the State court. However, many courts of appeals have also discussed and apparently relied somewhat upon the *Erie* approach. See, *e.g., Old Kent Bank and Trust Co.* v. *United States, supra,* p. 449; *Second National Bank of New Haven* v. *United States, supra,* certiorari granted, No. 240, this Term; *Faulkerson's Estate*

v. *United States, supra,* pp. 232–233; *Peyton's Estate* v. *Commissioner, supra,* p. 443; *Flitcroft* v. *Commissioner, supra,* pp. 455, 458–459.

The majority in this case did not reject the proposition that in a federal tax case where there has been no prior determination by a State court of the taxpayer's property interest, the federal courts must determine, in accordance with the Rules of Decision Act and *Erie,* how the highest State court would characterize the property interests. However, the majority below held that the Rules of Decision Act and *Erie* do not apply where a State trial court decision on the issue presented in the federal action has been obtained by a party to that action (R. 54–55). The opinion of this Court in *West* v. *A.T.&T. Co.,* 311 U.S. 223, however, may cast doubt on that view. The issue in *West* was the effect to be given in a federal action to a prior decision of a State intermediate appellate court in a case *between the same parties.* This Court began its analysis with the statement that "the state 'laws' which, by § 34 of the Judiciary Act of 1789 (the Rules of Decision Act) * * * are made 'the rules of decision in trials at common law' define the nature and extent of petitioners' right" (p. 236). The Court then held that a State intermediate appellate court decision provides a rule of decision that a federal court must follow unless it "is convinced by other persuasive data that the highest court of the state would decide otherwise" (p. 237). Thus, *West* can be read as indicating that a federal court may disregard a State intermediate appellate court (and *a fortiori* a State trial court) decision determining the

rights under State law of a party to the federal action, if the federal court is persuaded that the highest court of the State would have decided otherwise.[20]

While there is therefore some support in logic and in the decided cases for the *Erie* view, we believe that certain pragmatic considerations counsel against adopting that approach in its full sweep. As Judge Friendly stressed below, a holding that a federal court can never be bound by an erroneous determination of a State trial court "could operate unfairly in the many cases where persons having a genuine controversy over property rights desire resolution by an appropriate local tribunal without wishing to press their differences to the highest court of the state" (R. 58). For under the *Erie* view, a losing litigant who does not appeal to the highest State court runs the risk of being taxed as if he had won. The losing party in a non-adversary State proceeding has no real complaint if the federal court concludes that he should have won, since he voluntarily relinquished rather than

[20] *West*, however, does not necessarily so hold. The court of appeals in *West* had not passed upon the *res judicata* or collateral estoppel effect of the prior State court proceeding between the same parties. 108 F. 2d 347 (C.A. 6). The last paragraph of this Court's *West* opinion implies that it too declined to pass on these questions, and left them open on remand. 311 U.S. 223, 241. The court of appeals' opinion on remand suggests the same conclusion. 121 F. 2d 142, 143. It is thus altogether possible that this Court, having decided *Erie* only a few years before, chose the *West* case as an appropriate vehicle for deciding the effect to be given to decisions of a State intermediate appellate court, and treated the earlier State appellate case as if it had involved different parties, leaving for remand any possible *res judicata* or collateral estoppel effects of the previous State case.

asserted his rights in the State court. However, the same cannot be said of the losing party in a genuinely adversary State trial court proceeding.[21]

The *Erie* approach, moreover, necessarily requires the federal courts in every tax case to re-examine the decisions of lower State courts without regard to the circumstances in which they were rendered. Due regard for federal-State relationships counsels that wherever appropriate a federal court should avoid the conflict that may result when it re-examines State court decisions defining State property interests. This, we submit, can best be accomplished by adopting an intermediate position under which a federal court follows a State trial court decree unless it resulted from a non-adversary proceeding. In this way federal court re-examination of State law issues can be restricted to those cases in which there has been no real determination of such issue, while at the same time ensuring that a taxpayer cannot effect post-mortem estate tax reduction by obtaining an erroneous decree from a State trial court in a non-adversary proceeding.

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[21] Of course, as explained *supra*, p. 12, fn. 8, the Commissioner recognizes even an erroneous nonadversary decree which is "a mere cloak for a gift" (see supra, p. 18) as effecting a transfer of the property in question on the date of the decree, just as a gift of that property would have done. However, the *Gallagher* rule gives such a disguised gift *retroactive* effect and requires the Commissioner to treat the taxpayers as if the transfer had taken place at some time in the past (*e.g.*, at the time of decedent's death) and in some specified manner (*e.g.*, under the decedent's will), although the actual transfer of rights took place at the time of the erroneous, non-adversary decree and was from the legatee to the widow.

Moreover, the *Erie* rule is apparently inconsistent with the long-standing Treasury Regulations, which as discussed *supra,* pp. 17–18, strongly suggest that "a decision of a local court upon the merits in an adversary proceeding following a genuine and active contest * * * will be accepted" for estate tax purposes.[21a]

C. THE NON-ADVERSARY APPROACH

There are compelling indications that Congress did not intend that the federal fisc and the federal courts should be bound by a decision arising out of a non-adversary State trial court proceeding which involved no genuine controversy between the parties and no full and fair presentation of both sides of the issue on which the federal tax turns. Congress clearly provided that a property interest cannot qualify for the marital deduction unless it passed to the surviving spouse from the decedent at, or in some cases, before his death. 1954 Code, § 2056 (a), (d)(2), (e) (App. *infra,* pp. 39–42); *Jackson* v. *United States,* 376 U.S. 503. This rule was complemented by § 2056(d)(2), which, until 1966, provided that a legatee could not increase the marital deduction by disclaiming his inter-

[21a] If the choice were solely between the *Gallagher* rule and the *Erie* approach, we would urge the latter. The collection of federal taxes should surely not depend upon a State court determination rendered in a context which furnishes no assurance that the matter has been given meaningful consideration. The *Erie* approach, on the other hand, avoids this danger. We advocate the intermediate rule as set forth in this brief because we believe that it better accommodates the conflicting interests, consistent with Congress' purpose, than the full rigor of the *Erie* approach. Should the Court reject this rule, however, we urge it to adopt the *Erie* rather than the *Gallagher* approach.

est in favor of the widow.[22] There is no reason to believe that Congress intended to allow an increased marital deduction if a legatee disguised his disclaimer by participating in a non-adversary State judicial proceeding in which he failed to assert his rights. The decree obtained in such a proceeding does not reflect the rights the legatee would have had if he had asserted them; it merely confirms his voluntary relinquishment of those rights through an agreement unanimously reached by the affected parties.

Congress could scarcely have intended to require the federal courts independently to examine and apply State law when there has been no State court decree, but at the same time to prohibit the federal courts from making any examination of State law if a taxpayer, by participating in a non-adversary State proceeding, has obtained a judicial imprimatur for a post-mortem plan to reduce the estate tax burden. This is shown by the statement in the Senate Finance Committee Report on the marital deduction provisions that "proper regard should be given to interpretations of the will rendered by a court in a *bona fide adversary proceeding.*" S. Rep. No. 1013, *supra* (emphasis added). Thus Congress did not contemplate that when an estate tax controversy turns on what interest the decedent owned or bequeathed, the parties need only agree to relinquish rights that will reduce the federal estate tax burden and have their agreement embodied in a consent decree approved by a State probate or trial court in order

[22] See *supra*, fn. 14, p. 16, for a discussion of the 1966 amendment of limited scope to § 2056(d)(2).

to determine once and for all the estate tax controversy. As Judge Friendly pointed out (R. 65, fn. 6), "In the absence of contrary congressional direction the United States is entitled to litigate liability for federal taxes in its own courts. Compare *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220 (1957)." [23]

The non-adversary rule both eliminates the unfairness inherent in the other approaches and results in a minimal intrusion by the federal courts into the characterization of property interests under State law—which is primarily a function of State courts. The federal courts' role is restricted to two categories of cases—(1) those where the issue did not come before any State court; and (2) those in which the issue was nominally passed upon by a State court, but was neither genuinely litigated nor determined on the merits because of the absence of a real controversy between the parties to the cause. By thus restricting the cases in which federal courts can make independent characterizations under State law, appropriate recognition is accorded to the fact that where a State court has been fully informed of the relevant facts and legal precedents and the proceedings have been conducted in such a manner as to indicate that each side seeks to prevail, the decision of the State trial court does, in fact, constitute a considered determination on the merits of the property interest at

[23] See 28 U.S.C. 1340, 1346, 1491; 26 U.S.C. 7442; see also, *e.g.*, *Flora* v. *United States*, 326 U.S. 145; *Quinn* v. *Hook*, 231 F. Supp. 718, affirmed *per curiam*, 341 F. 2d 920 (C.A. 3); *Falik* v. *United States*, 343 F. 2d 38, 41–42 (C.A. 2); *Cooper Agency, Inc.* v. *McLeod*, 235 F. Supp. 276, affirmed *per curiam*, 348 F. 2d 919 (C.A. 4).

issue. In such circumstances, it seems appropriate that the federal courts, for tax purposes, follow the State court's determination of the State law issue.[24]

This approach, as noted earlier, is also supported by long-standing Treasury Regulations which strongly suggest that "a decision of a local court" will not "be accepted" unless rendered "upon the merits in an adversary proceeding following a genuine and active contest" (see *supra,* pp. 17–18), and *Freuler* v. *Helvering,* 291 U.S. 35, 45, which required the lower federal court to follow a State decree that was not "collusive in the sense that all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional tax."

A large majority of the courts of appeals have followed the terminology of *Freuler* and used the word "collusive" to designate those proceedings in which there was no genuine conflict between the parties and no fair presentation of both sides of the controversy. See, *e.g., Saulsbury* v. *United States,*

[24] To be sure, application of this principle might in a particular case result in a federal court being required to follow a State trial court determination which, although rendered in an adversary proceeding, appears egregiously wrong. A possible solution would be to hold that a federal court is obliged to accord great deference to a State trial court determination rendered in an adversary proceeding but is not bound to follow it in the extraordinary case where it concludes that the decision is manifestly erroneous. For the reasons given in the text, we believe, however, that a State court decree rendered in an adversary proceeding should be followed in subsequent federal tax litigation without examination of its correctness.

supra, p. 580; *Peyton's Estate* v. *Commissioner, supra*, p. 444; *Old Kent Bank and Trust Co.* v. *United States, supra*, p. 453; *In re Sweet's Estate, supra*, p. 404; *Newman* v. *Commissioner, supra*, p. 136. Thus, in *Saulsbury*, the Fifth Circuit stated that (p. 580)—

> it does not affirmatively appear that [the State trial court's] order was obtained in an adversary proceeding and that there was no collusion. By the word *collusion*, we do not mean to imply fraudulent or improper conduct, but simply that all interested parties agreed to the order and that it was apparently to their advantage from a tax standpoint to do so. * * *

Compare *Stallworth's Estate* v. *Commissioner, supra*, p. 763 ("If the Alabama suit was nonadversary in character it is not binding"). Since "collusive" commonly has a perjorative connotation and since it tends to obscure rather than highlight the factors which make it appropriate to reject a State trial court decree as conclusive, there is little to commend its continued use in this context, in place of the more accurate phrase "non-adversary."

In determining whether a proceeding was adversary, a number of factors must be taken into consideration. The taking of an appeal, for example, would be significant. Cf. *Blair* v. *Commissioner, supra*, and see *Kelley's Trust* v. *Commissioner*, 168 F. 2d 198 (C.A. 2). Whatever other factors are relevant, it is clear that the proceedings in the New York trial court in the instant case were non-adversary since they involved no controversy between the parties and there was no full and fair presentation of both sides of the issue.

II.

APPLICATION OF THE NON-ADVERSARY APPROACH TO THE INSTANT CASE WOULD REQUIRE REVERSAL

The ultimate question in this case is whether decedent's estate is entitled to a marital deduction for the assets in the revocable *inter vivos* trust created in 1931 (R. 3–5). For the estate to obtain that deduction, decedent's widow must have had a life estate in the trust plus a general power of appointment over the corpus at the time of decedent's death. 1954 Code, § 2056(b)(5); *Jackson* v. *United States, supra.*

Approximately five years before her husband's death, Mrs. Bosch had (in 1951) executed a partial release of her general power of appointment, purporting to convert it to a special power in order to prevent the corpus from being included in her gross estate for federal estate tax purposes (R. 39–40).[25] While the Tax Court proceeding in this case was pending, decedent's executor-trustee, in an effort to qualify the corpus of the trust for the marital deduction, obtained a decree from the Supreme Court of New York that the partial release was a nullity (R. 41–43, 45–47). The record clearly shows that this decision was erroneous under New York law and that the proceedings which gave rise to it were non-adversary.

A. THE STATE TRIAL COURT PROCEEDINGS WERE CLEARLY NON-ADVERSARY

As Judge Friendly observed, "The only reason advanced by the trustee for seeking a declaration as to the validity of the release was the effect on the trust's

[25] See *supra*, p. 3, fn. 1.

liability for its share of the taxes on Mr. Bosch's estate" (R. 63; see also R. 41–43). If the trustee, Irving Trust Company, was prompted to file the petition by a desire to reduce the federal taxes on decedent's estate, that desire appears to have been shared by the executor of decedent's estate—also the Irving Trust Company—as well as by Mrs. Bosch, and by a guardian *ad litem* representing a minor who was a possible beneficiary in the event Mrs. Bosch died without exercising her power of appointment—all of whom submitted briefs arguing that the release was a nullity (R. 10–11, 14–15, 43).

Thus, it is conceded that all briefs filed in the State trial court "took the same tack or presented the same side of the argument" and that "nobody raised a dissenting voice" (R. 15). With all of the parties arrayed on the same side of the issue and urging the same result, the State action was obviously not initiated in order to resolve a genuine controversy between the parties. Rather, what the parties really sought was a ratification by the New York court of their unanimous contention—a contention designed to reduce federal estate taxes and to resolve a tax controversy with the Commissioner, albeit he was not a party to the New York proceeding.[26]

B. UNDER NEW YORK LAW THE RELEASE EXECUTED BY DECEDENT'S WIDOW WAS VALID

While we do not ask this Court to decide the State law question whether the release was valid, we briefly

[26] In fact, the parties made it clear to the State trial court that all of them favored a decision that the release was invalid since that would save the family a substantial amount of federal estate tax (R. 43, 15).

discuss the relevant New York law to illustrate the dangers of permitting non-adversary State trial court proceedings to control the resolution of federal tax controversies.

Generally, a power of appointment created by a revocable trust is regarded as being vested subject to divestment and as releasable by the donee. *Restatement, Property,* § 334 (1940); 1 Scott, *Trusts,* § 57.1 (1939); cf. *Van Cott* v. *Prentice,* 104 N.Y. 45, 10 N.E. 257. When Congress passed the Revenue Act of 1942 imposing an estate tax on the holder of a general power of appointment unless released by a specified date,[27] New York, along with some 28 other states,[28] enacted laws designed to remove any doubt as to the ability of the holders of such powers to release them and thus qualify for the Congressional tax relief measure. New York's statute, passed in 1943, provided that "Any power which is exercisable * * * by deed or will, or otherwise * * * is releasable * * *." New York Real Property Law, 49 McKinney's Consolidated Laws of New York Annotated, § 183.

The State trial court nevertheless held that Mrs. Bosch's power of appointment—which was exercisable by will—was not releasable in 1951 since she did not have the right to exercise it at that time (R. 45–47). That court relied upon an 1888 decision, *Matter of Pifford et al.,* 111 N.Y. 410, which held that the donee of a power of appointment granted by will could not *exercise* that power prior to the death of the settlor

[27] Revenue Act of 1942, c. 619, 56 Stat. 798, 942, 944, §§ 403. 403(d)(3).

[28] See 3 Powell, *Real Property,* § 394 (1966).

but that the settlor's will should, nevertheless, be read as incorporating the donee's disposition. The State trial court did not mention *Matter of Woodcock,* 19 Misc. 2d 268, 186 N.Y.S. 2d 447, 450 (Surr. Ct. Westchester Co., 1959), which held that § 183 permits a donee to release a power of appointment prior to the time the power is exercisable. See also *Matter of Nicholas,* 204 Misc. 965, 126 N.Y.S. 2d 277 (Surr. Ct., Suffolk Co., 1953), modified on other grounds, 284 App. Div. 971, 134 N.Y.C. 2d 809 (1954), affirmed 308 N.Y. 971 (Ct. App., 1955); *Application of Chase National Bank,* 102 N.Y.S. 2d 124 (S. Ct. N.Y. Co., 1950); *Matter of Hodsdon,* 31 Misc. 2d 93, 219 N.Y.S. 2d 671 (Surr. Ct., Kings Co., 1961). The view that under § 183 the holder of a power of appointment exercisable by will may release his power *inter vivos* is consistent with both the language of that section and its purpose.[29] Thus, as Judge Friendly concluded, the partial release by Mrs. Bosch of her general power of appointment in 1951 was clearly valid under New York law (R. 60–64).

As we have shown, the proceedings in the New York court did not involve a genuine controversy and the

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[29] The ability of a donee to release a power of appointment even though not exercisable at the time of release has recently been affirmed by an amendment to the New York Real Property Law. 49 McKinney's Consolidated Laws of New York Annotated, § 146 (Supp. 1966). The amendment precludes donees of powers not presently exercisable from contracting to make an appointment but carefully states that "this section shall not, in any way, abridge the ability of the donee of a power of appointment not presently exercisable, to release his power, in whole or in part, pursuant to the provisions of [183's successor]." See Note, 65 Col. L. Rev. 1294 (1965).

parties did not make a full and fair presentation of both sides of the issue to the court. In fact, so far as the record shows, none of the parties even cited cases such as *Matter of Woodcock* and *Matter of Nicholas* to the State trial court. As Judge Friendly observed, "Under these circumstances it is not to be wondered that a judge sitting in the busy motion part of the Supreme Court for New York County should have erroneously ratified the parties' unanimous contention, citing only the inapposite decision of *In re Piffard*" (R. 64).

Although the record demonstrates that the proceedings in the New York trial court were both nonadversary and erroneous, the courts below did not specifically address themselves to these issues. The case should therefore be remanded for findings on these points.

CONCLUSION

For the reasons stated, the judgment below should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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JANUARY 1967.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

(a) *Allowance of Marital Deduction.*—

For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) *Limitation in the Case of Life Estate or Other Terminable Interest.*—

(1) *General rule.*—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest.

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

* * * * *

(5) *Life estate with power of appointment in surviving spouse.*—In the case of an interest

in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1) (A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * * * *

(c) *Limitation on Aggregate of Deductions.*—

(1) *General rule.*—The aggregate amount of the deductions allowed under this section (computed without regard to this subsection) shall not exceed 50 percent of the value of the adjusted gross estate, as defined in paragraph (2).

* * * * *

(d) *Disclaimers.*—

* * *

(2) *By any other person.*—If under this section an interest would, in the absence of a dis-

claimer by any person other than surviving spouse, be considered as passing from the decedent to such person, and if a disclaimer of such interest is made by such person and as a result of such disclaimer the surviving spouse is entitled to receive such interest, then such interest shall, for purposes of this section, be considered as passing, not to the surviving spouse, but to the person who made the disclaimer, in the same manner as if the disclaimer had not been made.[1]

(e) *Definition.*—For purposes of this section, an interest in property shall be considered as passing from the decedent to any person if and only if—

(1) such interest is bequeathed or devised to each person by the decedent;

(2) such interest is inherited by such person from the decedent;

(3) such interest is the dower or curtesy interest (or statutory interest in lieu thereof) of such person as surviving spouse of the decedent;

(4) such interest has been transferred to such person by the decedent at any time;

(5) such interest was, at the time of the decedent's death, held by such person and the decedent (or by them and any other person) in joint ownership with right of survivorship;

(6) the decedent had a power (either alone or in conjunction with any person) to appoint such interest and if he appoints or has appointed such interest to such person, or if such person takes such interest in default on the release or nonexercise of such power; or

(7) such interest consists of proceeds of insurance on the life of the decedent receivable by such person.

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[1] Section 2056(d)(2) was amended by P.L. 89-621, 80 Stat 872, which became law on October 4, 1966. See fn. 14, *supra* p. 16.

Except as provided in paragraph (5) or (6) of subsection (b), where at the time of the decedent's death it is not possible to ascertain the particular person or persons to whom an interest in property may pass from the decedent, such interest shall, for purposes of subparagraphs (A) and (B) of subsection (b)(1), be considered as passing from the decedent to a person other than the surviving spouse.

Treasury Regulations on Income Tax (26 C.F.R.):

SEC. 20.2053–1. *Deductions for expenses, indebtedness, and taxes; in general.*

* * * * *

(b)(2) *Effect of court decree.* The decision of a local court as to the amount and allowability under local law of a claim or administration expense will ordinarily be accepted if the court passes upon the facts upon which deductibility depends. If the court does not pass upon those facts, its decree will, of course, not be followed. For example, if the question before the court is whether a claim should be allowed, the decree allowing it will ordinarily be accepted as establishing the validity and amount of the claim. However, the decree will not necessarily be accepted even though it purports to decide the facts upon which deductibility depends. It must appear that the court actually passed upon the merits of the claim. This will be presumed in all cases of an active and genuine contest. If the result reached appears to be unreasonable, this is some evidence that there was not such a contest, but it may be rebutted by proof to the contrary. If the decree was rendered by consent, it will be accepted, provided the consent was a bona fide recognition of the validity of the claim (and not a mere cloak for a gift) and was accepted by the court as satisfactory evidence upon the merits. It will be presumed that the consent was of this character, and was so accepted, if given by all parties having an

interest adverse to the claimant. The decree will not be accepted if it is at variance with the law of the State; as, for example, an allowance made to an executor in excess of that prescribed by statute. On the other hand, a deduction for the amount of a bona fide indebtedness of the decedent, or of a reasonable expense of administration, will not be denied because no court decree has been entered if the amount would be allowable under local law.

* * * * *

SEC. 20.2056(e)—2. *Marital deduction; definition of "passed from the decedent to his surviving spouse."*

* * * * *

(d) *Will contests.*

* * * * *

(2) If as a result of the controversy involving the decedent's will, or involving any bequest or devise thereunder, a property interest is assigned or surrendered to the surviving spouse, the interest so acquired will be regarded as having "passed from the decedent to his surviving spouse" only if the assignment or surrender was a bona fide recognition of enforceable rights of the surviving spouse in the decedent's estate. Such a bona fide recognition will be presumed where the assignment or surrender was pursuant to a decision of a local court upon the merits in an adversary proceeding following a genuine and active contest. However, such a decree will be accepted only to the extent that the court passed upon the facts upon which deductibility of the property interests depends. If the assignment or surrender was pursuant to a decree rendered by consent, or pursuant to an agreement not to contest the will or not to probate the will, it will not necessarily be accepted as a bona fide evaluation of the rights of the spouse.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 673

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF HERMAN J. BOSCH, DECEASED,
IRVING TRUST COMPANY, Executor,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

Question Presented

When a question of State law comes in issue in a federal tax controversy and a State court of highest original jurisdiction, whose decisions are reported and have precedential value, has, after independent consideration, determined the character of a property interest owned or transferred by the decedent, which binds the parties to its judgment, is a federal court bound by that decision?

Statement

Herman J. Bosch, a resident of New York, died on April 6, 1957. He had created a revocable trust in 1930, which, as amended in 1931, directed that the income be paid to his wife during her life and granted her, but only if she survived him, a general power of appointment. In default of appointment, the trust provided that half the corpus was to go to her heirs and half to decedent's heirs then living. In 1951, in order to allow her to exercise the power after the decedent's death without causing the corpus to be taxed as part of her gross estate at her death, decedent's wife executed an instrument which purported to release her general power of appointment and to convert it into a special power of appointment.[1] (R. 4, 27-31, 33-34, 36, 37-38, 39-40.)

Decedent's executor claimed a marital deduction for the value of the trust ($70,222.04). This trust would qualify for a marital deduction only if, at the time of the decedent's death, his widow had possessed the right to receive the income from the trust for her life and a general power of appointment over the corpus of the trust. It would not qualify for the marital deduction if she had only the right to the income plus a special power of appointment. Internal Revenue Code of 1954, §2056(b)(5). In view of the widow's purported prior release of her general power of appointment, the Commissioner deter-

1. In respect to powers created on or before October 21, 1942, if a person exercises a general power of appointment over a trust, the trust assets are included in his or her gross estate. The exercise of a special power of appointment does not cause such an inclusion. If the general power is not exercised, no inclusion results. Internal Revenue Code of 1954, §2041(a)(1). Petitioner has apparently confused these rules with those applicable to powers created after October 21, 1942. (Footnote 1, p. 3; Petitioner's brief)

mined that the *inter vivos* trust corpus did not qualify for the marital deduction. The executor filed a petition in the Tax Court for a redetermination of the resulting deficiency (R. 3-6, 7).

The Tax Court controversy turned on whether the 1951 release by decedent's widow was invalid. In the event it was, she would still have possessed a general power of appointment at the time of her husband's death in 1957, and the trust would qualify for the marital deduction. While the Tax Court proceeding was pending, the trustee, who also is executor of the decedent's estate, filed a petition in the New York Supreme Court for approval of its intermediate account. No accounting had previously been made for the 33 years in which the trust had been in existence. In connection with the proceeding, a determination of the validity of the widow's attempted release in 1951 was requested. The Tax Court, with the Commissioner's consent, continued the Tax Court proceeding pending the outcome of the action in the State court (R. 1-2, 23, 41-43). Judge Friendly notwithstanding, a determination of the issue was necessary in the State court to bind all parties to the proceeding; it was the only way to fully protect the trustee. The court held, in a published opinion, that the release was a nullity (R. 10-11, 14-15, 45-47).

The Tax Court accepted the State trial court decision "as an authoritative exposition of New York law and adjudication of the property rights involved" (R. 24), and allowed the executor a marital deduction for the value of the assets of the trust. The court of appeals affirmed, Judge Friendly dissenting. The majority held that the New York judgment authoritatively settled the rights of the parties, not only for New York, but also for purposes of the application of the federal tax laws to those rights.

SUMMARY OF ARGUMENT

Petitioner's rule that the federal court is bound only in an adversary proceeding is difficult of application. It would require in each instance an extensive examination of the record in the trial court to determine whether or not an adversary proceeding had taken place. Further, it puts an extremely difficult burden upon the federal courts which, in addition to determining whether or not the State court proceeding was adversary, must then determine State law.

Respondent concedes that the federal fisc should not be bound by all State court determinations. Obvious examples include non-adversary determinations of factual matters, consent decrees, and instances where the State court determination could itself be collaterally attacked, e.g., where fraud is present.

The federal fisc is bound by an authoritative decision by a State court, i.e., where a State court has made an independent determination of a question of State law which has been regularly submitted to it for its decision.

This court has held that a non-adversary decision binds the federal fisc where it is the result of an independent determination by a State court of competent jurisdiction.

The issue before the State court involved the releasability of a general power of appointment at a time when that power could not be exercised under State law. No New York State court had determined this issue; it was a question of first impression.

I.

PETITIONER'S PROPOSED RULE IS DIFFICULT OF APPLICATION AND WOULD OFTEN WORK UNFAIR RESULTS.

The petitioner has proposed that the sole criterion for determining whether a federal court should be bound by a State court decision is whether the proceeding in the State court was adversary or non-adversary. He proposes that if the State court proceeding was adversary, the federal court should be bound, even though the result of the State court proceeding was contrary to state law. On the other hand, if the State court proceeding was non-adversary, the federal court would not be bound and would be required to make its own determination of State law and its application to the facts of the case. There are several obvious objections to the rule.

First, petitioner's rule would require a federal court to examine the record in the State court to determine whether the positions taken by the parties were in fact adversary. It is suggested that it is not always easy to determine when a litigation is adversary.

The petitioner suggests no definition of what is an adversary determination. Is a single voice raised in objection to the ultimate determination, but without detailed documentation or argument, sufficient? Would the federal court be required to examine the briefs to determine if the arguments against the ultimate determination were too weak? Would mere ineptness on the part of the unsuccessful counsel before the State court be sufficient to make the proceedings non-adversary? If so, what degree of ineptness? Would the federal court be required

to have a trial on the issue of whether, for example, the failure to cite a controlling precedent was mere neglect or evidence of the non-adversary nature of the proceeding?

It is submitted that the petitioner's proposed subjective test could result in even more uncertainty on the part of litigants in federal tax cases than is now the situation under the conflicting standards imposed by the various Courts of Appeal.

Second, there are many determinations by State courts which are "non-adversary", particularly if, as suggested by the Commissioner, one must appeal to make sure it is adversary. Petitioner's rule would, therefore, impose a great burden on the federal courts, in initially determining when it was not bound by a State court determination because of some undefinable degree of non-adversariness, and, then, in ruling on State law. Thus the already overburdened federal courts would be additionally and unnecessarily burdened.

Third, the petitioner's rule would not give effect to the many legitimate State court determinations made in a non-adversary context. The instant case is an illustration of a legitimate determination. The trustee had not filed an accounting since the trust had been created 33 years before. Once the controversy over the validity of the release by the decedent's widow of her general power of appointment had arisen, it was only by raising the issue in connection with a petition for approval of an accounting that the trustee could secure an adjudication that would determine the issue as to all parties interested. Only the Commissioner and the executor would have been bound by the Tax Court determination. In this way, the trustee could rely on the adjudication to protect itself after the death of the donee should she appoint outside

of the class as limited by the purported release. The donee could draw a will disposing of her property, secure in the knowledge that her exercise of a general power of appointment would be given effect.

Many State court proceedings arise in a non-adversary context. This is frequently true in the determination of property rights between members of a family. This is in no way sinister, as the petitioner seems to suggest. Parties may quite properly wish to receive no less than that to which they are legally entitled, and simply desire an authoritative, albeit non-belligerent, determination of their legal rights. They should not be prevented thereby from seeking recourse to a State court for resolution of questions of State law. (A State judge is better equipped for such a resolution than the federal courts because of the greater frequency with which he deals with State property rights.) Nor should they be forced to the expense of an appeal.

In the usual case, rights added to one party are taken from another. In such cases the petitioner's suggested rule would work a hardship upon the losing party to the State court proceeding. Petitioner states that, "The losing party in a non-adversary State proceeding has no real complaint if the federal court concludes that he should have won, since he voluntarily relinquished rather than asserted his rights in the State court" (Brief for Pet., pp. 25, 26). The conclusion does not necessarily follow from the premise. A party may be willing to have his rights determined without going to the expense of having a brief prepared in his behalf, but not be willing to lose and then be taxed as if he had won. Petitioner's rule would force a reluctant party to actively litigate an issue (perhaps even appeal an adverse decision) at the peril of being taxed on that which he did not possess.

Fourth, due deference to State court decisions is desirable to avoid an unnecessary intrusion by federal courts into the decisional law of a State. Operation of the petitioner's mechanical non-adversary rule could have the consequence in the instant case of the development of two interpretations of §183 of the New York Real Property Law, one in the federal courts and one in the New York courts. The federal courts should decide questions of State law only when compelled to do so because of the absence of an authoritative determination by a State court.

II.

NOT ALL STATE COURT DECISIONS SHOULD BE FOLLOWED.

Despite the desirability of adherence to State court decisions, respondent concedes that not all such decisions should be conclusive against the federal fisc. Thus, effect should not be given to fact-finding by a State court, particularly in a non-adversary context. The State court will not be aware of evidence withheld from it by the parties; a State court judge has no independent fact-finding apparatus. He can, however, make an independent determination of the law by reference to statutes, reported cases and commentaries. Nor should a determination be followed which purports to have a *nunc pro tunc* effect As was said in *Daine* v. *Commissioner*, 168 F. 2d 449, 452 (C.A. 2), "No sovereign is likely to permit its revenue to be set at naught through such retroactive manipulation of state judicial proceedings." See also *Straight's Trust* v. *Commissioner*, 245 F. 2d 327 (C.A. 8). Respondent also agrees that State court determinations which can be suc-

cessfully collaterally attacked for fraud or lack of jurisdiction would also not be binding.

Apart from these sorts of cases, which are by no means exhaustive and are cited only by way of illustration, authoritative State court decisions should bind the federal courts.

III.

THE ELEMENTS OF AN AUTHORITATIVE STATE COURT DECISION.

Respondent respectfully submits that an authoritative decision is one in which an independent determination by a court of competent jurisdiction has been made of the issues regularly presented to it. Indicia of such an independent determination would include the following: (a) appearances by all interested parties including guardians *ad litem* for infants or incompetents; (b) oral argument or submission of briefs; (c) necessity of determining the particular issue, so that its disposition will not be *obiter;* (d) serious attention in a published opinion of the court to the pertinent issue, so that it shall not have been disposed of merely *en passant;* and (e) publication for precedential value of the State court decision. Certainly, *Bosch* qualifies as an authoritative decision.

An independent appearance was made by a guardian *ad litem* for Peter Bosch, an infant who is one of the presumptive remaindermen. Three briefs were submitted, one by the guardian, one for the widow of the decedent (the donee of the power of appointment) by her own attorney, and one for the trustee by its attorneys. The opinion in the New York Supreme Court discussed the issue in detail, with citation of cases. The issue was

regularly raised by the petition of the trustee, in connection with a request for an approval of an accounting. Decisions of the Supreme Court of the State of New York represent legal precedent throughout the State, unlike decisions of local courts with limited geographical jurisdiction whose decisions are not precedents for other courts of the state. "• • • [T]he Supreme Court is a single great tribunal of general state-wide jurisdiction, rather than an aggregation of separate courts sitting in the several counties or judicial districts of the state," *Schneider* v. *Aulisi*, 307 N. Y. 376, 381, 121 N.E. 2d 375, 377 (1954).

IV.

THIS COURT HAS HELD THAT A FEDERAL COURT IS BOUND BY A NON-ADVERSARY STATE COURT DETERMINATION.

The petitioner in this case has argued that the criterion for the binding effect on a federal court of a State court's determination of property rights is whether the State court proceeding involved adversary positions taken by opposing litigants. The proposition has been presented by the government and adopted by various federal courts that the absence of adversary positions among the parties before the State court constitutes "collusion" in securing a decision by such court which would adversely affect the Government's right to additional tax. In support of this proposition, this Court's decision in *Freuler* v. *Helvering*, 291 U. S. 35 has been repeatedly cited.[2] In

2. *E.g.*, *Peyton's Estate* v. *Commissioner*, 323 F. 2d 438, 444 (C.A. 8); *Faulkerson's Estate* v. *Commissioner*, 301 F. 2d 231, 233 (C.A. 7), *cert. denied* 371 U. S. 887; *Stallworth's Estate* v. *Commissioner*, 260 F. 2d 760, 763 (C.A. 5).

order to determine whether this reliance upon the *Freuler* decision is appropriate, an analysis of the background of that case and of this Court's decision is in order.

The facts in the *Freuler* case were that the trustee of a trust, whose assets consisted in part of real property, had made annual distributions to the income beneficiaries without withholding from such income any amount to cover depreciation on the property involved. When the Commissioner of Internal Revenue sought to tax the income beneficiaries upon all the income they had received without allowance for depreciation, the trustee of the trust filed an account in the State trial court having jurisdiction, showing the payments made to the income beneficiaries. Objections to the account were filed by the remaindermen of the trust that the trustee should have withheld from income distributed amounts equal to the depreciation on the trust property.

The trustee's answer to this objection was as follows (Freuler, Record on Appeal, pp. 127, 128):

> "Admits the allegations in paragraph 2, and in his behalf alleges that the disbursements made in said fourteenth account were made without deduction of reserves or other provision for the depreciation mentioned in said paragraph, under and pursuant to the advice of counsel learned in the law retained by said trustee, to the effect that under and by virtue of the terms of said trust it was the duty of said trustee to make such disbursements without such deduction; that said trustee does not know now whether said advice was correct or not, and prays that this Court may decide upon the correctness of said claim so advanced by objectors herein, for the future guidance of said trustee; that by reason of the fact that these payments have been made for many years without objection, in good faith and on the advice of coun-

> sel, it is neither fair, just nor equitable that said trustee be charged on account thereof, save and except to the extent that trustee may be able to reclaim from the recipients of said disbursements such amount as the Court may hold to have been erroneously paid to them."

On the basis of this record the State court determined that income should have been retained by the trustee to cover depreciation, but that the trustee should not be surcharged for such failure and ordered the income beneficiaries to repay to the trusts the amounts so erroneously distributed.

The Government, in its brief before this Court, in *Freuler,* characterized the State court proceeding in the following language:

> "In the preceding argument it has been assumed that the decision of the State court in this case represented an actual adjudication of the question involved. The inference that it was not such an adjudication, however, seems irresistible. A consideration of the facts shown by this record make it plain, we contend, that the order of the State court was nothing more than a friendly settlement without any real contest, and requires the inference that the primary, if not the sole, object of the proceeding was to establish a basis for a deduction of depreciation for Federal income tax purposes. There was, of course, practically, such a community of interests that the apportionment of depreciation was largely a matter of indifference except as it might affect Federal tax liability."

The petitioner, at page 10 of his brief, interprets this Court's opinion in *Freuler* by saying:

> "This Court's decision in *Freuler,* clearly implied that a State trial court proceeding in which 'all

> the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax' would not be conclusive for federal tax purposes."

The excerpt which he quotes from the *Freuler* opinion is not this Court's statement of the circumstances which would preclude conclusive effect being given to the State court's determination, but was an exposition of the position urged by the Government in that case. This Court's statement of the criteria to be applied is set forth (291 U. S. p. 45) immediately following the portion quoted by the petitioner, where it said

> "The case appears to have been initiated by the filing of a trustee's account, in the usual way. Notice was given to the interested parties. Objections to the account were presented, and the matter came on for hearing in due course, all parties being represented by counsel. *The decree purports to decide issues regularly submitted and not to be in any sense a consent decree.*" (Emphasis supplied.)

A striking illustration of the non-adversary character of the State court proceeding in *Freuler* is the settlement made. The life beneficiaries made restitution of the amounts improperly paid them because of the trustee's failure to make a reservation for depreciation. Notes were given payable to the remaindermen, but only at the termination of the trust. Co-makers on the note given by one of the life beneficiaries were the two presumptive remaindermen who had originally filed their objections in the State court (*Freuler*, Record on Appeal, p. 145). Nor could this Court have been unaware of this, since it is referred to in Justice Cardozo's dissent (291 U. S., p. 48).

The background in *Blair* v. *Commissioner*, 300 U. S. 5, is strikingly similar to that in both *Freuler* and the

present case—the submission of a question of construction to a local court with only one side of the issue affirmatively presented. The only difference in *Blair* is that the State trial court, in making its independent determination, disagreed with the sole affirmative presentation made to it. On the appeal from its decision, again only one side of the argument was presented to the appellate court which reversed the trial court. The background of that proceeding was characterized by the Court of Appeals, 83 F. 2d 655, at p. 657 in the following terms:

> "We would be better satisfied if the suit in that state court had been more adversary in its nature. There is that which suggests a friendly suit to avoid taxes, to which there was no opposition or adverse party. All who joined in the litigation were desirous of obtaining the same end—the avoidance of a large part of the Federal income tax through division of the income by the beneficiary among his children. The Government was not a party to that suit. The suit was prosecuted only until a favorable decision was reached and then no appeal was taken."

With full awareness of the facts underlying the State court determination in *Blair,* this Court concluded (300 U. S. 5, at p. 10) that it was bound by such determination, the State court having

> "* * * reviewed the decisions of the Supreme Court of the State and reached a deliberate conclusion. To derogate from the authority of that conclusion and of the decree it commanded, so far as the question is one of state law, would be wholly unwarranted in the exercise of federal jurisdiction."

From the foregoing, it is apparent that the standard which has been applied by this Court is not whether the

State court proceeding was adversary or non-adversary, but, rather, whether an issue was regularly presented to the State court for its independent determination, resulting in a deliberate and considered conclusion, resolving the issue.

In view of the petitioner's repeated citation of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, a word should be said about its applicability to this case.

The basic difference between the doctrine of the *Erie* case and the doctrine of *Freuler* and *Blair* relates to whose and what property rights are the subject of the federal court action. Where the specific property rights of the taxpayers involved in the federal tax litigation have been fixed by the independent and considered determination of a State court, *Freuler* and *Blair* dictate that the federal court may look no further and is bound by the State court's determination. If, however, the specific property rights of the taxpayers have not been so determined by the State court so that the federal court must make its own determination of state law and the application thereof to the facts before it, *Erie* lays down rules as to what weight the federal court should give to various State court decisions in making that determination.

Thus, in this case, *Freuler* and *Blair* dictate that the federal court is bound by the State court decision on the property right in issue. If the taxpayer here was one whose rights had not been determined, then presumably *Erie* would apply.

V.

CONGRESSIONAL INTENT.

Petitioner cites Treasury Regulations §§20.2053-1(b)(2) (T.D. 6296) and 20.2056(e)-2(d)(2) (T.D. 6296) and certain language in Senate Report No. 1013, Part 2, 80th Cong., 2d Sess. (1948-1 Cum. Bull. 331, 334) as evidence that Congress intended that a federal court not accept a determination in a non-adversary context (Brief for Petitioner, pp. 8, 16-18, 22, 28). Both passages in the Regulations state that non-adversary proceedings will "not necessarily" be accepted. This is fully consonant with this Court's acceptance of certain non-adversary determinations in *Blair* and *Freuler* and respondent's suggested rule. The Regulations clearly suggest that certain non-adversary proceedings *will* be accepted. The bare statement in the Senate Report that bona fide adversary proceedings will be accepted (which no one disputes) casts little light on what non-adversary proceedings will be unacceptable.

VI

THE QUESTION BEFORE THE STATE COURT WAS A MATTER OF FIRST IMPRESSION.

The question before the State court in this instance involved the meaning of the language in Section 183 of the New York Real Property Law. This section provided that "[a]ny power which is exercisable * * * by deed or will, or otherwise * * * is releasable * * *". The basic problem in the Bosch matter was that at the time of Mrs. Bosch's purported partial release of the power, it could not have been exercised by her in any way, even by her will had

she died at that moment, by reason of the fact that the power was expressly not exercisable by her unless she survived her husband who was then still living.

The petitioner cites *In the Matter of Woodcock,* 19 M. 2d 268, 186 N.Y.S. 2d 447 (Surr. Ct., Westchester Co.) as controlling authority in the Bosch case and criticizes the New York Supreme Court for its failure to refer to that case. However, in *Woodcock,* the power of appointment involved was presently capable of exercise at the moment of its partial release, so that the case was wholly inapposite where the court's determination was based upon an interpretation of Section 183 that a power must be presenty capable of being exercised in order for it to be released.

All of the other cases cited by petitioner on page 35 of his brief contain the same distinguishing feature—the power in each was capable of being exercised at the time of its release. In fact no case presenting a similar set of facts under New York law has been found. For this reason the question before the New York Supreme Court was one of first impression.

Section 146 of the new Article 5 of the New York Real Property Law, cited by the petitioner (Brief for Petitioner, p. 35, footnote 29) and Judge Friendly below (363 F. 2d, p. 1017, footnote 4), makes it clear that §143 (the present version of old §183) allows the release of powers not presently exercisable. However, §143 is a revised version of old §183. The wording was changed from "Any power *which is* exercisable * * *" to "Any power, *whether* exercisable * * *" (emphasis added). The implication is that the legislature found it necessary to so revise the wording of old §183 in making a general revision of the statute to extend it to powers not presently exercisable.

CONCLUSION

FOR THE REASONS STATED, THE JUDGMENT BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 673

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HERMAN J. BOSCH, DECEASED, IRVING TRUST COMPANY, EXECUTOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In this brief, we reply to respondent's three principal arguments: (1) the non-adversary rule is unworkable and respondent's proposed rule is easier of application, (2) the *Freuler* decision does not support the non-adversary rule, and (3) the pertinent Regulations do not support the non-adversary rule.

1(a) Respondent argues that the non-adversary rule should be rejected because it is not easy to draw a sharp distinction between adversary and non-adversary proceedings. The courts, however, regularly are called upon to draw lines on the basis of criteria that are no more, and are often less, precise—concepts such as due care and unreasonable restraint

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of trade pose substantially the same problem—but that has not prevented the courts from effectively utilizing such standards in deciding legal issues. For it is a commonplace that an otherwise proper standard is not to be rejected because of difficulty in drawing the line in close cases. As Justice Holmes once said, "Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing about in the law." *Irwin* v. *Gavit*, 268 U.S. 161, 168.

Moreover, in many cases, such as this one, the facts will leave little room for doubt as to which side of the line the case falls. Whenever, as here, there was no controversy between the parties (all of whom urged the State court to adopt the same position) and only one side of the issue was presented (that which would result in the hoped-for tax reduction), it is clear that the proceeding was non-adversary and that an erroneous decree rendered in such circumstances should not have conclusive effect for tax purposes.

The non-adversary approach does not, as respondent suggests, require that the proceedings be "belligerent," but only that a State trial court decree must adjudicate a dispute between the parties, not merely ratify the parties' unanimous contention if it is to control federal tax consequences. There is no legitimate reason why a taxpayer who has initiated a suit in a State trial court and then declined "to actively litigate an issue" in that court (Resp. br. 7) should thereby bar the Com-

missioner from litigating that issue in a federal tax case.[1]

(b) Nor does respondent propose a clear-cut standard by which to gauge the effect of a State trial court decree in a federal tax suit. Respondent argues that a State decree is binding if it is "an authoritative decision" (Br. 9). In deciding this question, respondent suggests that the federal courts should consider, *inter alia*, the following factors: whether the State trial court gave the issue "serious attention," whether the State court made "an independent determination," and whether (and to what extent) the State trial court's decision is entitled to "precedential value" (Br. 9). Such a standard is certainly no easier to apply—or more likely to produce sound results—than the non-adversary test which the vast majority of the appellate courts are now using without unusual difficulty.[2]

Respondent also suggests that the federal court should consider whether all interested parties had appeared, whether briefs had been submitted, and whether oral argument had been made. Formalities,

[1] Respondent argues that the non-adversary rule might tax a beneficiary "on that which he did not possess" (Br. 7). The estate tax, however, is levied upon the estate, not upon the beneficiary. Therefore, a beneficiary who relinquished his right to receive a bequest would not be subject to any tax.

[2] For example, the "precedential value" to be accorded the decision would presumably depend upon such factors as the status of the court, the reputation of the judge, the significance of the issue decided, and, perhaps most important, the cogency of the judge's analysis of the issue. The other factors proposed by respondent, such as whether the court gave the issue "serious attention" and made "an independent determination," are no easier to apply.

however, give no assurance that the proceeding is anything more than an instrument of tax avoidance—for these criteria would be met if all the parties urged the same result, cited the same authorities, and adopted the same position throughout, as was true in the instant case.

(c) Even respondent agrees that *factual* determinations made by a State trial court are not binding in a federal tax case if the State proceedings were non-adversary (Br. 8). The reason respondent gives for refusing to follow non-adversary *factual* determinations—the State trial court may "not be aware of evidence" unless presented by the parties (Br. 8)— applies equally to *legal* determinations resulting from non-adversary proceedings. Where the parties have adopted a unanimous position as to a legal issue, a busy State trial judge is hardly likely to undertake exhaustive independent research. His professional bias is to reserve his energy for disputed questions. Thus, the trial court may not be aware of pertinent legal authorities unless brought to its attention by the parties. For example, in the companion *Second National Bank* case, the probate court rendered its decision approving the uncontested proration as proposed by the executor on the same day that it received the guardian's memorandum, and apparently without consideration of the uncited State decisions which would have required the opposite conclusion (see our brief in *Second National,* p. 21).

Moreover, no function would be served by requiring that the effect given a State trial court decree turn on whether the issue decided was factual or legal—

the possibilities of tax avoidance are the same in either case. The Sixth Circuit has rejected just such a distinction. In *Stark* v. *United States,* 351 F. 2d 160 (C.A. 6), certiorari denied, 384 U.S. 939, the court unequivocally refused to follow an erroneous factual finding reached by a State probate court in a non-adversary proceeding. A short time later, it rejected a taxpayer's argument that the rule should be different where the question was the effect of a State trial court's legal conclusion rather than its factual finding, stating that in *Stark* it had "rejected a somewhat similar effort" to "employ a non-adversary Probate Court proceeding in order to achieve post-death estate tax planning." *Old Kent Bank and Trust Co.* v. *United States,* 362 F. 2d 444, 450 (C.A. 6).

(d) Respondent cites *Daine* v. *Commissioner,* 168 F. 2d 449, 452 (C.A. 2), for the proposition that a sovereign is not "likely to permit its revenue to be set at naught through such retroactive manipulation of state judicial proceedings" and agrees that a State trial court "determination * * * which purports to have a *nunc pro tunc* effect" should not be followed (Br. 8). Yet that is precisely the effect that it seeks to attribute to the non-adversary decree of the instant New York trial court. As explained in our main brief in this case (p. 12, fn. 8, and p. 26, fn. 21) and in our brief in the *Second National* case (pp. 13–16), a non-adversary State trial court decision that decedent's widow rather than his son owns certain property included in decedent's estate is conclusive on the federal government *prospectively, i.e.,* from the date of the decree, just as if the son had made a gift of the

property to his mother at that time. All we seek to do here is deny such non-adversary decree *retroactive* effect as a determination that the widow received the property from decedent at the time of his death, rather than after his death through relinquishment by the son of his rights. (See *ibid.*)

(e) Respondent argues that the State decree should be binding in this case because (as it contends) the State accounting proceeding was necessary in order to protect the trustee should decedent's widow, at her death, appoint outside of the class as limited by her release (Br. 6–7). Respondent makes this argument although (1) the release left her free to appoint to anyone in the world except herself, her estate, her creditors or the creditors of her estate (R. 39), (2) there was no existing dispute between any of the parties as to the scope of the widow's rights,[3] (3) the State proceeding was "prompted" not by the trustee's desire for protection but by the federal tax controversy (R. 10), (4) the trustee "had not filed an accounting since the trust had been created 33 years before" (Resp. br. 6), and (5) the trustee would have been completely protected if it had waited until the widow's death and then, in the unlikely event that she appointed the property to one of the prohibited class, declined to make distribution until it had tested the legal question here presented. Even if there were some basis for claiming that the accounting was necessary, we would urge that it does not bind the federal tax authorities when the parties, instead of having litigated

[3] So far as the record shows she had no intent to appoint to her estate or her creditors.

their rights, merely sought judicial ratification of their unanimous agreement.

2. Respondent next contends that *Freuler* v. *Helvering,* 291 U.S. 35, precludes this Court from adopting the non-adversary approach because that case is authority for the proposition that "a federal court is bound by a non-adversary State court determination" (Br. 10). That contention is without merit. In *Freuler,* this Court was concerned with a special section of the Revenue Act of 1921 (repealed in 1924) which provided that trust beneficiaries were taxable on income which was distributable according to an "order governing the distribution."[4] Reasoning that Congress intended, by this language, to give effect to "the order of the court having jurisdiction of the trust" (p. 44), this Court held that a distribution order of a State trial court having jurisdiction over the trust was determinative. Thus, even if respondent has correctly interpreted *Freuler,* it would not be binding in this case dealing not with the unusual 1921 statute, but with the marital deduction, as to which the governing statute makes no reference to any court decree. (See also the legislative history, long-standing Regulations, and policy consideration discussed in our main brief, pp. 13–18, 27–30.)

However, despite the specific language of the unusual 1921 statute involved in *Freuler,* the Court did not reject the government's argument that a State trial court order should not be followed if rendered in a non-adversary proceeding brought to reduce taxes.

[4] Revenue Act of 1921, c. 136, 42 Stat. 227, § 219(d), repealed by Revenue Act of 1924, c. 234, 43 Stat. 253, § 219.

Instead, this Court considered on the merits the government's argument that a State trial court decree would not be binding if "all the parties [had] joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax" (*id.* at 45); it rejected that argument as *factually* inapplicable in *Freuler,* noting *inter alia* that some of the beneficiaries had filed objections to approval of the trustee's account. Whether this Court was correct in concluding that the State court proceedings in *Freuler* were sufficiently adversary to satisfy the unusual statute involved in that case is not relevant here; the significant point for present purposes is that the non-adversary approach was not rejected. Since that approach is supported by the legislative history of the marital deduction provision, by longstanding administrative practice, by the Regulations, and by the majority of the courts of appeals, it is appropriate for this Court now to adopt it.

3. Respondent argues that the two pertinent Regulations do not support the non-adversary rule because they "suggest that certain non-adversary proceedings will be accepted" (Br. 16). The Regulations merely indicate that if a State court decree is correct, it will be accepted regardless of whether it was rendered in an adversary or a non-adversary proceeding, but that a decree which is erroneous, *i.e.,* one which is "at variance with [State] law," will be accepted only if rendered "in an adversary proceeding following a genuine and active contest," *i.e.,* only if it is not "a mere

cloak for a gift."[5] Therefore, these two Regulations (one of which has remained substantially unchanged since 1919 and the other since 1949) strongly support the non-adversary approach.

Respectfully submitted.

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MARCH, 1967.

[5] Quotations are from Treas. Regs. § 20.2053–1(b)(2) and § 20.2056(e)–2(d)(2), which are reproduced at pp. 42–43 of the Appendix to our main brief and discussed at greater length at pp. 16–18 of that brief.

*In lieu of the Solicitor General who has disqualified himself.

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In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 240

THE SECOND NATIONAL BANK OF NEW HAVEN, EXECUTOR OF THE WILL OF FREDERICK F. BREWSTER, LATE OF HAMDEN, DECEASED,

Petitioner

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PETITIONER AND APPENDIX

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Teschner, *State Court Decisions, Federal Taxation and the Commissioner's Wonderland: The Need for Preliminary Characterization*, February, 1963, Taxes — *The Tax Magazine* 32

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THE SECOND NATIONAL BANK OF NEW HAVEN, EXECUTOR OF THE WILL OF FREDERICK F. BREWSTER, LATE OF HAMDEN, DECEASED,

Petitioner

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the District Court for the District of Connecticut is reported at 222 F. Supp. 446 and is also printed in the record. (R. 86-107)

The opinion of the Court of Appeals for the Second Circuit is reported at 351 F.2d 489 and is also printed in the record. (R. 114-124)

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was made and entered on September 28, 1965. (R. 124) The petition of The Second National Bank of New Haven as Executor aforesaid for a rehearing and its suggestion for rehearing in banc were denied on March 21, 1966. (R. 125) The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Connecticut statutes prescribe that federal and Connecticut estate taxes paid by a decedent's estate are to be equitably prorated among persons interested, i.e., donees of taxable inter-vivos transfers, pecuniary and specific legatees and recipients of the residue. If a particular gift does not generate any estate taxes because of the marital deduction or its charitable character, no estate taxes can be prorated against it. The statute applies to every estate paying such taxes, unless the testator in his will has clearly and unambiguously directed otherwise.

The marital deduction allowable under the federal estate tax law is limited to fifty per centum of the adjusted gross estate or to the net value of properties passing without charges or encumbrances from the decedent to the surviving spouse, whichever is the lesser. In proration proceedings in this decedent's estate, the probate court fixed by decree the amount

of property actually distributable to the widow; it was less than the fifty per cent ceiling. No appeal was taken, and the decree became a final adjudication of the amount of the widow's share. In so doing, the probate court ruled that the apportionment statute was applicable with respect to residuary gifts, for lack of a clear and unambiguous testamentary direction to the contrary; thereby the widow's share was relieved of the burden of the estate taxes generated by the properties in the residue.

The Internal Revenue Service did not recognize the probate decree as a final adjudication of the right of the widow, under Connecticut law, to receive her residuary share free of estate taxes attributable to residual properties. It asserted her share was subject to such taxes, thereby reducing the amount of the marital deduction and increasing the estate taxes assessable against the estate. A deficiency in taxes was assessed on this account, and this suit seeks a refund of the additional taxes paid.

Two questions are presented for review:

(1) Whether the law of the State of Connecticut requires the apportionment statute to be applied and estate taxes prorated as between the residuary gifts because the testator did not clearly and unambiguously direct otherwise?

(2) Whether the probate decree was a final adjudication of the widow's property rights entitled to full faith and credit and conclusive in assessing federal estate taxes?

STATEMENT OF THE CASE

Petitioner is the sole executor of the will of Frederick F. Brewster, a resident of Connecticut, who died on September 16, 1958. The decedent's will and a codicil thereto were admitted to probate by the Probate Court for the District of Hamden, Connecticut, on October 6, 1958. The will was originally executed on June 5, 1958. Article One provided:

> "ONE: I direct my executors hereinafter named to pay out of my estate my just debts and funeral expenses and any death taxes which may be legally assessed upon or with respect to any property which is required to be included in my gross estate under the provisions of any death tax law. The provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries of this will or the transferees of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate."
>
> (R. 12)

The remainder of the will provided certain pecuniary or specific bequests to his wife and others and left the residue in trust. In Article Nine of the will the testator stipulated that one-third of the residue was to be held in trust during the life of his wife, Margaret F. Brewster, and the income paid to her. Upon her death the trust was to terminate, and the corpus was to be paid in equal shares to three children, or their issue. The other two-thirds of the residue was to be held in trust for the benefit of all the decedent's grandchildren living upon his death. (R. 16-18)

On July 1, 1958, within a month of the execution of his original will, the decedent executed a codicil thereto by which he altered the provisions of his original will in two respects. (R. 23, 24) First, he amended Article Two of the will in which he had provided that certain expenses that might arise

in connection with certain charitable gifts were to be paid from the principal of the widow's trust. (R. 23) The codicil deleted the provisions for payment from the widow's trust and instead created a separate trust with the income and principal to be used to meet such expenses. The second alteration in the will related to the widow's trust. The decedent specified that in addition to the income of the trust for life, his wife was to receive a general testamentary power of appointment over the corpus of the trust (*i.e.*, one-third of the residue). In default of appointment, the corpus of the trust was to be paid over, as provided in the original will, to three of his children, or their issue. By this change, the decedent qualified the widow's trust for the marital deduction provided by Section 2056 of the Internal Revenue Code of 1954 and tax exemption. The testator stated in the codicil that "In all other respects I hereby republish and confirm my said will." (R. 24)

On December 16, 1958, the petitioner and another executor, who later resigned, filed a federal estate tax return reporting an estate tax liability of $4,028,613.85 based upon a gross estate of $13,201,347.90 and a taxable estate of $8,392,892.80. (R. 50, 53, 61) The return claimed as part of the marital deduction the corpus of the widow's residuary trust. (R. 58) This was computed as one-third of the residue before the payment of estate taxes attributable to residuary properties. In essence the widow's allowance, the pre-residuary legacies and taxes thereon, the debts and administration expenses were deducted from the total probate estate; one-third of the remainder was allocated to the widow's trust which was then reduced by the state succession taxes levied against it. (R. 56-58)

On October 18, 1961, following an audit of the estate tax return, the District Director of Internal Revenue forwarded to

the executors a so-called "30-day letter" [1] showing a deficiency due in the amount of $1,336,468.40. (R. 66) This deficiency resulted principally from two determinations made by the District Director: the disallowance of the widow's allowance as part of the marital deduction and the reduction of the marital deduction for the widow's trust from $3,630,243.95 to $1,682,846.59. (R. 69, 70) The latter adjustment was based on the District Director's determination that estate taxes should not be prorated between residuary gifts and that the widow's trust should receive one-third of the residuary estate computed after the payment of all federal and state death taxes, including the estate taxes generated by the residuary properties. (R. 70)

Upon filing the federal estate tax return in December 1959, the executors had paid the estate tax reported due, *i.e.* $4,028,613.85. (R. 49) On November 10, 1961 the executors filed an application in the probate court to determine the proration of the federal estate taxes paid. Since all such taxes attributable to non-residuary gifts were recognized as payable out of the residue by express direction of the testator, proration could relate only to residuary shares. The total federal estate tax attributable to the residuary properties and subject to proration was $3,832,550.45. (R. 29-35)

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[1] Such a letter is an intermediate step preceding the issuance of a "90-day letter" or statutory notice of deficiency. The letter informs the taxpayer of certain rights of appeal within the Internal Revenue Service. The function of a 30-day letter is described in Section 601.150(d) of Statement of Procedural Rules (Internal Revenue Service) (26 C.F.R., Sec. 601.105 (d)).

Notice of the application and hearing thereon was given, *inter alia*, to the decedent's widow, two adult grandchildren who were beneficiaries of residuary trusts, the guardian-ad-litem for the seven minor grandchildren also beneficiaries of residuary trusts, and the District Director of Internal Revenue at Hartford. (R. 75, 76) The District Director was also furnished with a copy of the executors' application and computation of the proposed proration they deemed necessary. (R. 8, 84)

The guardian-ad-litem, an attorney-at-law, filed his report under oath stating that there were no legal objections to the proration of the federal estate tax as set forth in such application and in his letter transmitting the report to the Judge of Probate, he stated the grounds for his opinion. (R. 77, 80)

Neither of the adult grandchildren nor the District Director of Internal Revenue appeared at the hearing or made their positions known to the probate court. (R. 80) Subsequent to the hearing and on December 26, 1961 the probate court filed a memorandum of decision approving the executors' proposed proration and entered a decree in which it:

> "ORDERED, that the federal estate tax be prorated in the manner and in the amounts set forth in said application and that said Executors are authorized, empowered and directed to charge the prorated amounts against the persons against whom the tax is so prorated as set forth in said application."
>
> (R. 80-81)

Thereafter the Commissioner determined and assessed a deficiency in the amount of $1,333,194.35 tax plus $195,285.58 interest, ruling that the widow's allowance did not qualify for the marital deduction and finding that the amount of the marital trust was as stated in the 30-day letter. (R. 9) The peti-

tioner paid the deficiency and commenced this timely suit for refund in the amount of $1,600,000 plus interest in the United States District Court for the District of Connecticut. (R. 51)

The plaintiff-executor moved for summary judgment on the issue of liability in the district court. (R. 47) At that time the case contained the issue relating to the tax status of a widow's allowance which has since been conceded. On the issue which is involved here the district court, in Part II of its opinion (R. 94-102), held that the will did not contain a clear and unambiguous direction against proration of taxes in the residue, and accordingly, the Connecticut proration statute applied to the residuary shares, and the widow's trust being exempt from federal taxes should bear no part of them. (R. 98)

The district court also ruled in Part III of its opinion (R. 102-107), that the probate decree respecting proration with which it agreed in principle was not binding and conclusive upon a federal court in applying federal revenue laws. (R. 106)

Hence judgment was entered in the district court in favor of the plaintiff. (R. 111)

Each party appealed to the Court of Appeals for the Second Circuit, the appeal of the plaintiff relating only to the issue concerning the widow's allowance which it has now conceded. (R. 112, 113)

The Court of Appeals reversed the judgment of the district court (R. 124) and the plaintiff's petitions for rehearing and rehearing in banc were denied. (R. 125)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

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Sec. 12-401. Proration of estate taxes. Procedure

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SUMMARY OF ARGUMENT

POINT I

Congress in creating the marital deduction planned that it be measured in part by the law of the domiciliary State.

The Connecticut proration statute, on the basis of equitable principles requires that the widow whose bequest does not contribute to the tax burden should bear no part of it.

In Connecticut proration of estate taxes is the mandate of the legislature unless the testator directs otherwise by words so clear as to dispel all doubt of the testator's desires.

A will containing a direction to pay all death taxes from the residuary estate, such as the first sentence of Article One of Mr. Brewster's will, leaves a doubt concerning the testator's intention respecting proration between residuary gifts and therefore, the apportionment statute applies to them.

The second sentence of Article One is not a clear direction against proration between residuary shares because when written, all of them were equally taxable. The testator did not speak to that matter either in the will or codicil. Further the second sentence expresses an unwillingness of the testator to have residuary shares responsible for ultimate payment of death taxes and thus contradicting what is said in the first sentence.

The Court of Appeals purported to avoid the doubts that existed by a "construction" of the will thereby departing from the established principle that only a clear and unambiguous directive will prevent operation of the apportionment statute.

POINT II

The probate decree was rendered by a court of competent, in fact exclusive, jurisdiction. It was an authoritative court whose decisions by statute are entitled to full faith and credit unless reversed on appeal or set aside for fraud or lack of jurisdiction.

Decisions of the Connecticut probate courts, have been said by this Court, to determine finally as "against the world" all questions arising in the succession of estates in their possession. Their decrees are recognized as having an in rem effect.

The probate decree determining that the widow's share was not to bear the burden of estate taxes generated by the residuary properties, thereby fixing the amount of the marital deduction, was entitled to full faith and credit and was conclusive in the assessment of the federal estate tax.

Prior decisions of this Court and of the Courts of Appeal in the Third and Fourth Circuits and despite its decision in this case, in the Second Circuit too, support the result we urge.

The probate decree was neither collusive nor non-adversary and no issues of fact of that type remain in the case.

ARGUMENT

I.

THE CONNECTICUT PRORATION STATUTE IS APPLICABLE BETWEEN RESIDUARY SHARES AND HENCE THE WIDOW'S SHARE CANNOT BE REDUCED BY ESTATE TAXES ON THE RESIDUE.

The Connecticut apportionment statute was enacted in 1944 and became effective July 18, 1945; since then it has been amended only once and in a manner that did not affect so much of its language as is involved here. The statute operates on Connecticut and federal estate taxes that have been paid; it was not intended to affect the calculation of such a tax. The purpose of the statute was to achieve an equitable distribution of estate taxes, levied on account of inter vivos transfers, specific and pecuniary bequests and residuary gifts, making allowances for exemptions and deductions recognized by the taxing acts.

The marital deduction in the federal estate tax law was not created by Congress until the Revenue Act of 1948, so the Connecticut apportionment statute could not have been designed to have any impact on it. Under what is now Section 2056 of the Internal Revenue Code, (App. 3a) Congress allowed a bequest to a surviving spouse to be deducted in computing the taxable estate but prescribed that the deduction should not exceed fifty per centum of the adjusted gross estate nor more than the net value of the property passing unencumbered to the surviving spouse. The statutes also prescribed that in determining the net value of such property allowance must be made for the burden of death taxes which it carries.

In any decedent's estate, it is the domiciliary state which determines how the burden of death taxes is to be borne.

It may do so by statute as Connecticut has done in the case of its succession tax; under that taxing act the tax against each beneficiary is measured by and charged against his share. The proration of state and federal estate taxes, however, has been entrusted to the courts of probate as part of their function in overseeing the settlement of decedents' estates. (App. 9a) Surely Congress when it created the marital deduction was aware of these matters and that the amount of the deduction might well differ from state to state. It must have perceived that the amount would be affected by a widow's rights under the intestacy laws, and also by whether the domiciliary state did or did not have an apportionment statute, and further, by particular provisions of such a statute and the manner in which it was applied.

Thus the fact that a probate decree may affect the amount of a marital deduction and the amount of estate taxes assessable is brought about solely because Congress adopted the law of the State of Connecticut as a criteria for measuring the amount of the deduction in estates of decedents domiciled there. See *Riggs* vs. *Del Drago* (1942), 317 U.S. 95, where the Court said, at page 98:

> "• • • Congress intended that state law should determine the ultimate thrust of the tax. That Congress, from 1916 onward, has understood local law as governing the distribution of the estate after payment of the tax • • • is confirmed by § 812(d) of the Code, dealing with charitable deductions, which recognizes that estate taxes may be payable in whole or in part out of certain bequests, etc. 'by the law of the jurisdiction under which the estate is administered.' "

Also pertinent is the footnote on pages 98 and 99 quoting the Chairman of the Ways and Means Committee, *viz.*:

> "• • • We do not follow the beneficiaries and see how much this one gets and that one gets, and what rate should be levied on lineal and what on collateral relations, but we simply levy on the net estate. *This also prevents the Federal Government, through the Treasury Department, going into the courts contesting and construing wills and statutes of distribution.*" (emphasis supplied)

In the instant case, the interest passing to the widow consisted of certain jointly-owned property, some pre-residuary bequests of real estate and personal property, and a bequest of residue. Article Nine of the will, as amended by the codicil, disposed of the residuary properties. By Part I thereof, one-third of the residue is bequeathed to a trustee to pay the income to the widow for life, and she is given a general power to appoint the remainder by her will; if this power is not exercised, the remainder passes to the testator's three children or their issue, *per stirpes*. The jointly-owned property, the outright pre-residuary bequests of real estate and personal property, and this residuary bequest qualify for the marital deduction and do not exceed fifty per cent of the value of the adjusted gross estate. By Part II of the residuary clause, the remaining two-thirds of the residuary properties are bequeathed in trust for the testator's grandchildren.

The Connecticut Supreme Court first considered the apportionment statute in *McLaughlin* vs. *Green*, 136 Conn. 138, where the issue was whether taxes attributable to certain inter vivos trusts should be prorated against them or paid out of the residue. The testator had directed in his will:

> "FIRST: I order and direct the payment of all succession, transfer and inheritance taxes from my residuary estate."

The court held that this language was not sufficiently clear to prevent the operation of the apportionment statute and to require payment of taxes attributable to the inter vivos trusts out of the residue.

Out of *McLaughlin* vs. *Green, supra,* came the principle that because of the equitable and remedial character of the apportionment statute, exception to it should be allowed only when there is a clear, specific and unambiguous direction against it. The Connecticut court relied upon *Matter of Mills,* 272 App. Div. 229, 233, 70 N.Y.S. 2d 746, quoting from the opinion in that case with approval. Incidentally, the Connecticut statute was modeled on the New York statute and the law in the two jurisdictions has developed similarly.[2] In subsequent decisions of the Supreme Court of Connecticut the principle that that application of the apportionment statute could be avoided only by a clear and unambiguous direction to the contrary became firmly established in the jurisdiction of the state. See *Jerome* vs. *Jerome* (1952), 139 Conn. 285, 93 A.2d 139; *New York Trust Co.* vs. *Doubleday* (1956), 144 Conn. 134, 128 A.2d 192; *Guaranty Trust Co.* vs. *New York City Cancer Committee* (1958), 145 Conn. 542, 144 A.2d 535; *Morgan Guaranty Trust Co.* vs. *Huntington* (1962), 149 Conn. 331, 179 A.2d 604.

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[2] *In Matter of Huntington,* (App. Div. - N.Y., 1962), 14 A.D. 2d 312, 316, the court said the New York law respecting tax apportionment is essentially the same as the law of Connecticut. Hence decisions of New York courts are persuasive in determining the construction and operation of the Connecticut proration statute. *Powers* vs. *Hotel Bond Co.,* (1915), 89 Conn. 143, 148; *Imperial Laundry, Inc.* vs. *State Board of Labor Relations,* (1955), 142 Conn. 457, 460.

The proration statute provides that in prorating estate taxes, "allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate • • •." (Gen. Stat. 12-401). (App. 9a) *Jerome* vs. *Jerome*, *supra*, was the first case before the Connecticut Supreme Court involving the apportionment statute and a marital deduction and it held that the excerpt from the statute quoted above required the full amount of the marital deduction to be allocated to the value of the widow's bequest. At page 292, the court said:

> "The proration statute authorizes the judge of probate, when preparing his schedule of proration, to make allowances for any deductions used in lowering the amount of the federal estate tax. While the statute does not specifically state to whom such allowances shall be given, the obvious inference is that it refers to those beneficiaries who received any property, interest or benefit, the value of which was used, by way of deduction, to reduce the amount of the taxable estate. In the case at bar, the application of the marital deduction will shrink the estate, for tax purposes, to substantially one-half its otherwise taxable size. Since the purpose for which the marital deduction was created was to permit the survivor to take, free of the federal estate tax, a share in the spouse's estate up to 50 per cent of its value, the deduction should properly be allowed as a credit against the value of the property passing to that survivor. 3 Locke & Kohn, *Connecticut Probate Practice*, p. 152. Only through the allocation of the entire amount of the marital allowance to the value of the widow's bequest will the intent as well as the spirit of the proration statute be met, for the statute is based on the equitable principle that the estate taxes

> should be borne by those whose bequests contribute to the tax burden and, conversely, that all those whose legacies do not in any way create or add to that burden should not be required to bear it. * * *"

Hence in the instant case, if the proration statutes do not apply as the United States contends, the entire federal estate tax is payable from the estate before the residuary is determined, the widow's trust of one-third of the residue bears one-third of the federal tax, and the amount of the marital deduction is accordingly reduced. On the other hand, if the proration statutes do apply as the executor contends, the amount of the widow's trust is determined without reducing the residue by the amount of federal taxes it generates; that trust being itself exempt from tax because it qualifies for the marital deduction, bears no part of such taxes; and the marital deduction is the full amount of the property passing to the widow.

So the basic issue is whether the Connecticut proration statutes apply, and that turns on whether the will contains a specific and unambiguous direction to the contrary. *New York Trust Co.* vs. *Doubleday, supra,* is a highly relevant and significant authority. In this case, the tax clause of the will read as follows:

> "I direct my executors to pay from my residuary estate all estate, inheritance, transfer, succession and other death taxes or other taxes in the general nature thereof which may be payable with respect to any property included in my gross taxable estate * * *."

A one-fifth part of the residue was given to the surviving widow, so the issue arose whether the tax clause quoted was so expressed as to prevent the application of the proration statute within the residuary estate itself. Thus the issue was identical with that presented here.

In deciding that the proration statute should operate within the residuary estate, the court first reiterated the general rule, at page 141:

> "We have said that a testamentary directive against the prorating of taxes must be clear and unambiguous, since the practical effect of such a directive is to increase the size of the gifts to some by shifting to others the burden of absorbing the tax. *Jerome* vs. *Jerome*, 139 Conn. 285, 289, 93 A.2d 139. Proration, then, is the rule, indeed, the mandate, to which exception is possible only if the testator clearly indicates otherwise."

The court then lent emphasis to this statement by saying further that when a will contains a tax clause, it must disclose just what lies in the testator's mind:

> "• • • so that all doubt as to the extent or limitation of his command may be completely dispelled."

Referring to the tax clause, the court then said, at page 141:

> "• • • At first blush, this language might seem to be sufficiently broad and inclusive to cover gifts of the residue itself as well as those resulting from specific devises and legacies. Upon reflection, however, there arises some doubt that this was the testator's intention. Since a doubt exists, the tax clause lacks the clarity necessary to make the proration statute inoperative as to the residuary gifts. *Whatever may have been his unexpressed intention, the testator neglected to speak clearly upon the question of proration as it applies to the residuary gifts. The directive in the will that all estate taxes be paid from the residue is not a directive against the prorating of estate taxes among residuary gifts.*" (emphasis added)

So under the law of Connecticut the issue here is narrowed to this question, *i.e.*: Did the testator speak clearly upon the matter of proration as it applies to the residuary gifts?

The complete answer is that the testator did not speak to that matter at all. The will was executed on June 5, 1958. The residuary trusts for widow and grandchildren were similarly taxable; no attempt was made to qualify the widow's trust for the marital deduction, so there was no reason or room for proration between residuary shares. Manifestly the matter of proration between residuary shares was not in the testator's mind and could not have found any expression in the words of Article One. The will was silent on that subject.

On July 1, 1958, the codicil was signed. The single change of importance here was the conversion of the widow's trust into one that qualified for the marital deduction. The Court of Appeals held that this modification by the testator does not bespeak any intention to alter his wishes expressed in Paragraph "One" which was specifically republished and confirmed. With this statement we are in complete agreement and we believe it reflects the law of Connecticut. See *First National Bank* vs. *Baker* (1938), 124 Conn. 577, 1 A.2d 283; *Griffith* vs. *Adams* (1907), 106 Conn. 19; *Colt* vs. *Colt* (1865), 32 Conn. 422.

Also the Court of Appeals referring to Paragraph One says, "Thus in summary the testator specifically wished to have death taxes paid out of his estate but without proration." Were we to concede, arguendo, that he directed death taxes on inter vivos transfers and preresiduary bequests to be paid out of the residue, we cannot admit that he has spoken clearly upon proration as between the residuary gifts. Since that was not a subject which he had in mind, he cannot be understood as having spoken about it. At very least, he failed to speak

so precisely that "all doubt as to the extent or limitation of his command" was completely dispelled. Hence as the district court held, under the law of the State of Connecticut, the proration statute applies to gifts within the residue.

The district court in considering this aspect of the case had the benefit of the opinion of the New York Court of Appeals in a strikingly parallel case, *Matter of Shubert* (1962), 10 N.Y. 2d 461, 180 N.E. 2d 410. This case had not been decided when the probate court acted. In the *Shubert* case, a codicil had altered certain of the residuary bequests to render them charitable and tax exempt and it had also republished the will without changing the tax clause. At page 475, the New York Court of Appeals said:

> "In considering the testator's intention at the time he drafted the tax clause, one further aspect of his original will should be considered. Under the 1949 will, prior to amendment by codicil, the four equal residuary trusts therein set up were fully taxable, * * *.
>
> "Under the original scheme, then, taxes would have been paid out of the capital of the trusts, for there is no apportionment of taxes between income beneficiaries and remaindermen of a fully taxable trust (Decedent Estate Law, § 124(2)). Each of the four trusts under the original will thus had the same value for estate tax purposes, and the tax clause, drawn as part of the original will, was meaningless insofar as intra-residuary apportionment was concerned. Whether apportionment was directed or not, the tax burden on each residuary trust would have been the same. The residuary bequests were changed by codicil. Hence it is difficult to perceive how the clause now may be read as an express direction to accomplish something totally unnecessary when it was drafted."

The Court of Appeals for the Second Circuit concludes the portion of its opinion dealing with this subject by what appears to be a retreat from its position that Paragraph One had the

same meaning after the codicil as it had before. Notwithstanding this, it seems to say that Paragraph One acquired a different meaning because the will,

> "• • • would speak as of *the date of death* when proration under the Connecticut statutes presented a definite problem to be guarded against." (emphasis supplied)

We know of no other authority suggesting that a will or codicil may acquire a meaning it did not hold at execution by reason of the circumstances existing at the moment of death. We can attribute no other meaning to the words quoted.

To further buttress its ultimate conclusion, the court makes these statements:

(a) "• • • the testator had ample opportunity to consider on republication any further special tax treatment for his wife's one-third share had he desired to do so."

(b) "The codicil shows a desire to qualify one-third of the residue as a marital deduction. It does not disclose an intention to have this part of the residue in effect tax free and grossly disproportionate to the other two-thirds."

The first of these has the character of a finding of fact made by an appellate court without any evidence; it is pure speculation and for that reason we submit should be disregarded. But the significance of each quotation is that it evidences a complete misapprehension of the law of Connecticut. Tax exemption for a gift qualifying for the marital deduction is not "special tax treatment" but the ordinary rule. A testator does not have to "disclose an intention" to secure the full benefit of the exemption. It has been granted to the spouse by the Connecticut legislature and can be taken away from the spouse only by words of the testator so plain and specific that they dispel all doubt as to his wishes. If the testator is silent or neglects to use specific words or to choose them carefully, the spouse has the full benefit of the deduction.

There is still another reason why Article One cannot be regarded as an unambiguous declaration against proration within the residue. It is evident from Article One that the testator did not want any death taxes charged against preresiduary transfers. But if the testator's phrase "beneficiaries of this will" used in the second sentence be understood as including residuary legatees, then the second sentence reflects a wish that they too not be held for the "ultimate payment" of death taxes. This wish is a contradiction of the first sentence. A similar conflict was the controlling factor in the decision in *Matter of Pepper* (1954), 307 N.Y. 242, 120 N.E. 2d 807 where the tax clause in the will read as follows:

> "THIRD: All of the bequests hereinafter made shall be paid over and all of the trusts hereinafter created shall be set up by the executors and trustees, *freed from all deductions for inheritance, transfer, estate, or any other tax* imposed by any Commonwealth or State of the United States or Government of the United States for the inheritance or transfer of interest in a decedent's estate, which tax, including any tax payable by virtue of insurance on my life or any gifts or disposition of assets which I may have made during my life, *I will and direct shall be paid out of my residuary estate.*" (emphasis supplied)

In later paragraphs of the will, the testator created several trusts, each containing a share of the residuary, and one of which, a trust for his widow, qualified for the marital deduction. In holding that the apportionment statute must be applied, the Court of Appeals said at page 250:

> "• • • The first clause directing the trusts to be set up free of tax and the last clause directing all taxes to be paid out of the residuary estate cancel out or neutralize each other. The net result is that this will does not contain a direction against statutory apportionment. However, in deciding this case we need not go that far. We need

only hold that it does not contain a clear and unambiguous direction to that effect. There is a strong policy in favor of statutory apportionment. Those who contend against apportionment must bear the burden of proof (*Matter of Kaufman*, 170 Misc. 436; *Matter of Dettmer*, 179 Misc. 844) and the direction in testator's will must be clear and unambiguous. As was said in *Matter of Mills* (189 Misc. 136, 141, *aff'd.* 272 App. Div. 229, *aff'd.* 297 N.Y. 1012, *supra*): 'In case of doubt as to what the will means on the subject of taxes the statutory direction to apportion is absolute.' • • •"

Similarly, in the instant case, if the testator in using the phrase "beneficiaries of this will" in the second sentence meant to include residuary beneficiaries, then the language of that sentence reflects a desire that they too not be required to bear the burden of death taxes, and the first and second sentences are in direct conflict. This was apparent to the guardian-ad-litem, the probate court and the district court, and was one reason each of them concluded that proration between the residuary gifts was necessary. (R. 77, 82)

The Court of Appeals said that this doubt arose not from the language of the will but from two fallacious assumptions. The first of these, it said, was that

"• • • 'beneficiaries' in the second sentence are intended as the residual legatees only • • •"

(R. 120)

But the doubt arises and exists so long as "beneficiaries" includes the residuary legatees. Whether "beneficiaries" refers to residuary legatees among others, or to them alone, the second sentence reflects an unwillingness of the testator that they be required to ultimately pay any death taxes. The conflict with the first sentence is patent.

The Court of Appeals cites *In the Matter of Ellen W. Duryea*, 277 N.Y. 310, 317, 14 N.E. 2d 369, 371 (1938), and

calls the reasoning persuasive. The case concerned a will and a codicil which altered certain preresiduary gifts in such a way that the beneficiary finally received a power of appointment over the remainder of two trust funds. The tax clause in the original will, which was not changed by the codicil, read as follows:

> "I direct that all transfer, inheritance and estate taxes be paid out of my residuary estate and that all the foregoing gifts, legacies and devises shall be free from and without deduction of any such taxes."

The thrust of the truncated quotation in the court's opinion (R. 122) is that if the donee of the power failed to exercise it and thus the gifts-over made by the testatrix became effective, the death taxes on such gifts should be paid out of the residuary estate. In other words, the meaning of the tax clause was unaffected by the codicil. The rationale of the decision is the same as that in *Matter of Shubert, supra.*

The Court of Appeals refers to its own decision as "construing Paragraph 'One' to direct that the proration laws of Connecticut do not apply". This aptly describes the opinion which is based upon conjecture and speculation. We have previously referred to the suggestion of the Court of Appeals that the testator did not want the widow's share so "grossly disproportionate" to the provision for his grandchildren. There is no factual or evidential basis for their supposition. Much more reasonable is the view of the court in *Dodd et al, Executors* vs. *United States,* (C.A. 3) 345 F.2d 715 in imputing to the testator an overriding intention that his widow and estate should have the full benefit of the marital deduction. The employment of the process of construction by the court below serves no purpose; it only emphasizes its disregard of the law of Connecticut, which by its insistence upon "a clear and unambiguous direction" dispelling all doubts, forbids the use of surmise as a substitute.

II.

THE DECREE OF THE CONNECTICUT PROBATE COURT WITH RESPECT TO PRORATION OF THE FEDERAL ESTATE TAX CONCLUSIVELY ESTABLISHED FOR THESE TAX PROCEEDINGS THE AMOUNT OF THE SURVIVING SPOUSE'S INTEREST IN THE ESTATE.

No appeal having been taken from the probate decree, the latter fixed beyond the power of any court to change, except for fraud, the amount of the widow's share in the residue of the estate. It similarly determined that her interest in the residue should not bear any part of the federal estate tax attributable to the residue. The issue under this point is whether this adjudication by the probate court is a conclusive determination in these tax proceedings of the amount of the marital deduction. The Court of Appeals and the district court both concluded that the decree of the probate court was not binding and conclusive in this matter. The reasons advanced for their conclusions were: (1) The probate court is not a court of record; (2) Most of the judges of the probate courts are laymen, not lawyers; (3) Decisions of probate courts are not binding on the state's higher courts; (4) Decisions of probate courts are subject to collateral attack in another probate district.

In answer to these reasons, we submit:

(1) The probate court in Connecticut is a court of record.

Lillico vs. *Perakos*, (1965), 152 Conn. 526, 532;
Willis vs. *Keenan*, (1956), 144 Conn. 33, 51;
Shelton vs. *Hadlock*, (1892), 62 Conn. 143, 151;
Locke & Kohn, *Connecticut Probate Practice*, Vol. 1, Sections 16 at p. 30, 18 at p. 33 and 19 at p. 35.

See also the various provisions of the Constitution and General Statutes of Connecticut (Revision of 1958) as amended through the year 1961 relating to the organization and powers of probate courts which are collected and set forth at pages 12a-14a of the appendix to this brief and show beyond peradventure that such a court has all the attributes of a court of record.

(2) A substantial number of probate judges in Connecticut are not lawyers. There is no constitutional or statutory requirement in Connecticut that the judge of any court of the state be a lawyer or have had any legal education; nor are we aware of any constitutional or statutory provision affecting the federal judiciary which establishes such a prerequisite for judicial appointment. The effect to be given a particular probate court decree cannot be determined by counting the number of probate judges who are laymen. An exception to the statute cannot be carved out of the full faith and credit doctrine (28 U.S.C. § 1738; App. 7a) which turns upon the quality of the education or training of the judge. And parenthetically may we emphasize that the probate judge who passed the decree involved here was and is a lawyer of the highest repute for learning and of vast experience in the law; no one in the State of Connecticut would have been more competent than he to render a conclusive decree.

(3) A probate court decree is not binding on the appellate court in the event of an appeal any more than the decision of the Court of Appeals in these proceedings is binding upon this Court. *Heiser* vs. *Morgan Guaranty Trust Co.*, (1963), 150 Conn. 563, 192 A.2d 44, does not support the statement for which cited by the Court of Appeals. The fact is, that Section 45-9 of the General Statutes of Connecticut (App. 13a) provides:

> "• • • All proper orders, judgments and decrees of courts of probate, rendered after notice and from which

no appeal is taken, shall be conclusive and shall be entitled to full faith, credit and validity and shall not be subject to collateral attack, except for fraud."

(4) Since probate courts are courts of limited jurisdiction, decrees of those courts can be collaterally attacked for want of jurisdiction, as in *Culver's Appeal*, (1880), 48 Conn. 165, 172, upon which the Court of Appeals relies. But collateral attack upon probate decrees is limited to cases of fraud or want of jurisdiction. In *Gallup, Trustee* vs. *Fox* (1894), 64 Conn. 491, the court pointed out at page 493 that the record of a court of probate or of any other inferior court is only *prima facie* evidence of jurisdictional facts

> "but of any material facts upon which it adjudicates, its judgment imports absolute verity, as fully as does the judgment of a court of general jurisdiction."

The rule applied in Connecticut with respect to the effect of probate court decrees is succinctly stated in *Goodno* vs. *Hotchkiss*, (D.C., Conn., 1916), 237 F. 686, at page 697:

> "Under the decisions of the Connecticut courts, collateral attacks upon decrees of courts of probate have been limited to cases of fraud or want of jurisdiction; but in all other cases, including cases of distribution, such decrees have been uniformly and consistently treated as judgments of courts of competent jurisdiction and in the nature of judgments in rem, and conclusively bind the subject-matter in controversy against all persons or their privies who have any interest in the subject-matter. • • •"

See also: *State of Connecticut* vs. *Blake, Trustee* (1897), 69 Conn. 64, 78;

Hall vs. *Hall*, (1917), 91 Conn. 514, 521;

Johnes vs. *Jackson, Executor*, (1895), 67 Conn. 81, 90.

In *Tilt* vs. *Kelsey*, (1907), 207 U.S. 43, 56, 57, this Court held that it was within the power of a sovereign state "to give to its courts the authority, while settling the succession of estates in their possession through their officers, the executors or administrators, to determine finally as against the world all questions which arise therein". It added that the State of Connecticut had given such conclusive effect to its probate court decrees.

Although *Tilt* vs. *Kelsey*, dealt only with the respect which the courts of another state must give to a Connecticut probate decree, it is clear the federal courts must treat it similarly. See Constitution, Article IV, Section 1, and the statute implementing it, 28 U.S.C. § 1738. (App. 7a) The familiar language of Judge Brandeis in *American Surety Company* vs. *Baldwin* (1932), 287 U.S. 156, 166, is pertinent:

> "The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts."

And, during the intervening years, its strength has not diminished. See *Durfee* vs. *Duke* (1963), 375 U.S. 106.

This Court has consistently given full faith and credit to state court decrees establishing property rights and interests. In *Uterhart* vs. *United States* (1916), 240 U.S. 598, 603, it held that a New York decree construing a will was binding in a tax proceeding for the reason that such a decree "determines not only legally but practically the extent and character of the interests taken by the legatees." Similarly, in *Freuler* vs. *Helvering* (1934), 291 U.S. 35, this Court held that the decision of a California court, obviously similar to a Connecticut probate court, determining that annual deductions for depreciation of the trust property should have been taken from gross income

before making distributions to life income beneficiaries established the law of California respecting the amount distributable to those beneficiaries; and, since the beneficiaries' rights were property rights, the decision of that court determined the amount distributable for purposes of the federal income tax laws. Also, in *Blair* vs. *Commissioner* (1937), 300 U.S. 5, this Court said, at page 9:

> "SECOND: The question of the validity of the assignments is a question of local law. The donor was a resident of Illinois and his disposition of the property in that State was subject to its law. By that law the character of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign that interest in whole or in part, are to be determined. The decision of the state court upon these questions is final. • • • It matters not that the decision was by an intermediate appellate court. • • • In this instance, it is not necessary to go beyond the obvious point that the decision was in a suit between the trustees and the beneficiary and his assignees, and the decree which was entered in pursuance of the decision determined as between these parties the validity of the particular assignments. • • •"

See also: *Helvering* vs. *Stuart* (1942), 317 U.S. 154, 161.

In *Gallagher* vs. *Smith* (C.A. 3, 1955), 223 F.2d 218, the court in an effort at clarification of the various Courts of Appeals decisions in this field, classified the situations involving the application of state law into three groups: (a) situations in which federal criteria are imposed; (b) situations not involving a peculiar federal rule on the one hand or property rights on the other but merely a determination of some other question of law or fact asserted to be involved in the federal tax case; and (c) situations "in which a state court has deter-

mined the rights of the parties to income or other property involved in the tax litigation and the tax is imposed by the Internal Revenue Code solely upon the person entitled to the income or other property under the state law," there being no federal criteria imposed. The Court of Appeals concluded that it is only in the third group that binding effect must be given to a state court decree in determining federal tax liability.

A similar analysis was made and conclusion reached in Teschner, *State Court Decisions, Federal Taxation and the Commissioner's Wonderland: The Need for Preliminary Characterization,* in the February 1963 issue of Taxes — *The Tax Magazine.* In its conclusion the article says of the third class of cases:

> "(3) *Where the state courts have determined in rem property rights upon which the federal tax is predicated* — In such cases, a decision by a state court which acted within its jurisdiction is conclusive upon the point for all purposes, including federal tax purposes. Here, by definition, one of the federal criteria for decision necessarily depends upon those property rights. The federal courts not having any power to affect the property rights themselves, it is nonsensical for courts to talk of 'disregarding' them 'for federal tax purposes.' Even in the fairyland which the Commissioner seeks, he may disregard only the state adjudication and may not disregard the fact that the ownership adjudicated in the state court is one of the facts of life."

We submit that the decisions of this Court require that conclusive effect in this action be given to the probate decree with respect to proration because that decree is an *in rem* determination of the widow's property rights. This position is further supported by decisions involving the identical issue

which is present in the instant case namely, the effect of proration on the amount of the marital deduction. In *Pitts* vs. *Hamrick*, (C.A. 4, 1955), 228 F.2d 486, at page 490, the court said:

> "Whatever be the general law of South Carolina with respect to the matter, however, the decision of the probate court, which has not been appealed from, has settled the law, so far as this estate is concerned, and has vested in the widow her one-third free and clear of federal estate taxes. There is no showing that it was entered as a result of collusion or fraud or in a non adversary proceeding. Its effect was not merely to free the widow's share of responsibility for estate tax but to direct that this tax be paid from other shares. In other words, it fixed the amount of the widow's share of the estate; and whether this was done erroneously or in accordance with law, the amount of her share has been fixed thereby and the shares of other distributees have been decreased accordingly. As the amount which the widow will thus receive does not exceed one-half of the adjusted gross estate, and as she received it under the law of the state by decree of one of its courts, the estate is entitled to deduct it in computing the federal estate tax. Action of the probate court, even if erroneous, is valid unless reversed. • • •"

To the same effect are:

Estate of E. V. Babcock vs. *Commissioner*, (C.A. 3, 1956), 234 F.2d 837;

Weyenberg vs. *United States*, (D.C., E.D., Wis., 1955), 135 F. Supp. 299, 302;

Gordon vs. *United States*, (D.C., W.D., Mo., 1958), 163 F. Supp. 542;

Martinson vs. *Wright*, (D.C., Idaho, 1959), 181 F. Supp. 534;

Smith vs. *United States,* (D.C., W.D., S.C., 1959), 59-2 U.S.T.C. 11,907;

Provident Trust Co. of Philadelphia, Executor vs. *United States,* (D.C., E.D., Pa., 1958), 1958-2 U.S.T.C. 11,815; *aff'd* on other grounds (C.A. 3, 1959), 268 F.2d 779.

Apparently recognizing that the probate court decree can have a conclusive effect, the United States alleged in its answer that the decree of the probate court in connection with the proration "was the result of a proceeding which was collusive and/or non-adversary in nature." (R. 84) The law presumes that court proceedings are regular and valid and the burden of proving that the probate court decree was collusive rests on the Government. *Northwest Security Nat. Bank of Sioux Falls* vs. *Welsh,* (D.C., S.D., 1962), 203 F. Supp. 263, 266. Where collusion is asserted by the United States, it is incumbent upon it to produce at least some evidence to that effect. *Mary K. Miller* (Tax Court, 1963), 22 T.C.M. 1081; *Estate of Farish* vs. *United States,* (D.C., S.D., Texas, 1964), 64-2 U.S.T.C. 12,255. It is beyond dispute that the District Director of Internal Revenue, some twelve days before the probate hearing received from the attorneys for the executors, copies of the latters' application for proration of estate taxes and their proposed computation of the proration and notice of the hearing before the probate court. Thereby the executors made a complete disclosure of their views and position to the Internal Revenue Service. This is admitted by the Government's answer. (R. 8, 26, 75, 84) No evidence has been offered by the Government in this litigation by affidavit or otherwise in support of its allegation that the probate proceeding was collusive and non-adversary. And despite the court's failure to make a finding of fact on this issue, the Government's allegation indeed appears to be a hollow claim; it

should not be permitted at this late date to assert that a question of fact still exists. (R. 84)

Under the authorities that have dealt with similar situations, we submit that the probate proceedings here cannot be regarded as collusive or non-adversary. Thus in *Gallagher* vs. *Smith, supra,* at page 224, the Court of Appeals in the Third Circuit said:

> "• • • Moreover, other courts have taken the view that a binding state judgment adjudicating property rights must be given conclusive effect in tax cases even though it was entered by consent, and this appears to be the view of the Supreme Court. • • •
>
> "Whatever may be the case with respect to consent decrees, however, it is clear that if the question at issue is fairly presented to the state court for its independent decision and is so decided by the court the resulting judgment if binding upon the parties under the state law is conclusive as to their property rights in the federal tax case, regardless of whether they occupied adversary positions in the state court or were all on the same side of the question. • • • we think that the fact that the parties all favored the same result in the state court is relevant only so far as it is evidence of collusion and should not in and of itself vitiate in the federal court such conclusive effect as the state law gives to the judgment with respect to the property rights determined by it. For if in the absence of fraud such a judgment does determine the rights of the parties in the property they must thereafter live with it so far as their enjoyment of the property is concerned. • • •
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> • • •
>
> "• • • We think the necessary conclusion is that whether the proceeding was adversary or non-adversary

is not the test of conclusiveness in these cases but rather whether the judgment is an adjudication by the state court of a property right upon which solely the federal tax is imposed, which adjudication was and is final and binding upon the parties under the state law, and which was not obtained by collusion for the purpose of defeating the tax."

The same court considered the subject again in *Estate of I. G. Darlington* vs. *Commissioner*, (C.A. 3, 1962), 302 F. 2d 693 and said at page 695:

"We have also held squarely, in two of the three cases cited above, *Beecher and Gallagher*, that in order for the state court to settle conclusively the property question under state law and by that to fix the tax consequences under federal law, it is not necessary that the adjudication be the result of a contest in which one party says yes and another no. • • •

"There is not the slightest indication of a collusive arrangement here. All parties were summoned; the matter was presented in open court at a regular session thereof. Because the petitioner's request did not develop into a fight between the parties interested in the estate does not make the adjudication any less conclusive. We think it pretty clear that if anybody changes his mind concerning the result reached in the state adjudication he will have a bad time trying to avoid the effect of the Delaware County Orphans' Court's decision."

Similarly in *Goodwin's Estate* vs. *Commissioner*, (C.A. 6, 1953), 201 F.2d 576, the court recognized the absence of an active contest in the probate court and said:

"• • • Clearly the Probate Court proceeding was not an active and genuine contest, for every party to the proceed-

ing agreed that the claims were valid. However, the petitioner was a party having an interest adverse to the interests of the daughters. As widow of the decedent, petitioner was entitled to one-third of the net estate administered in the Probate Court after payment of claims against the estate. Section 10503-4, General Code of Ohio. The three daughters were entitled to share equally in the remainder of the estate. It is undisputed that the payment of the claims of the daughters reduced the distributive share of the widow over $30,000. The amounts paid the daughters upon their respective claims exceeded the distributive share that they would otherwise have received by varying amounts, by far the largest excess over her distributive share having been received by Frances G. Gustafson. The other two daughters therefore had an interest adverse to the allowance of the claim of Frances G. Gustafson. As the estate was solvent, the widow and daughters were the only interested parties in the proceeding with reference to the allowance of claims.

"The decree of the probate court was rendered after a hearing of which all parties had notice, and in which oral testimony was taken. While consent to the entry of the decree was given, it was given 'by all parties having an interest adverse to the claimant.' • • •

• • •

"• • • The Probate Court had exclusive jurisdiction of the subject matter. • • • It was empowered to determine all questions of fact underlying its decisions. • • • While an appeal from the order of the Probate Court could have been taken to the Court of Common Pleas, no appeal proceedings were instituted. The Probate Court's decision by its allowance of the claims substantially and adversely affected the property rights of the three beneficiaries

of the estate. This was undeniably a decision on the merits and the Regulations were squarely applicable."

To the same effect are:

National Bank of Commerce of Norfolk, Executor vs. *United States,* (D.C., E.D., Va., 1958), 58-1 U.S.T.C. 11,763;

Stackpole vs. *Granger,* (D.C., W.D., Penn., 1955), 136 F. Supp. 382;

Weyenberg vs. *United States, supra;*

Northwest Security Nat. Bank of Sioux Falls vs. *Welsh, supra;*

Estate of Farish vs. *United States, supra;*

To say that only a case which is contested in the courtroom is an adversary proceeding is to accept appearance rather than substance. The appearance of an adversary proceeding is a prime characteristic of collusion in legal proceedings. The basic element of an adversary proceeding is that the legal or property rights of one or more persons may be affected adversely. The State of Connecticut and John Jones are no less adversary in a manslaughter case because John Jones chooses to agree with the State and plead guilty; in the instant case, the widow and the grandchildren were no less adversaries because the guardian-ad-litem for the grandchildren, after careful consideration of the case pursuant to his obligations to his wards and the court, chose to agree with the executor's position. Clearly, by the decree of the probate court, the widow's property rights in the decedent's estate were increased at the expense of the grandchildren's rights. This is the essence of an adversary proceeding, not the mere appearance of contest. To adopt the words of the court in the *Gallagher* case, "in the absence of fraud such a judgment does determine the rights of the parties in the property" and so "they must thereafter live with it so far as their enjoyment of the property is con-

cerned." It is this determination to which this court gave conclusive effect in *Uterhart*, *Freuler* and *Blair* and which this court said, in *Tilt* vs. *Kelsey*, *supra*, that Connecticut probate courts could "determine finally as against the world."

After the decision in the case at bar, a different panel of judges of the Court of Appeals for the Second Circuit decided *Commissioner* vs. *H. J. Bosch*, (C.A. 2, 1966), 363 F.2d 1009. The amount of a marital deduction was at issue. The court held that a judgment of the Supreme Court in New York authoritatively settled the rights of the parties not only for New York, but also for the application to those rights of the relevant provisions of federal tax law. The court in the *Bosch* case was able to distinguish the decision in the instant case only on the ground "that the determination of the Connecticut Probate Court was not authoritative in Connecticut." We submit that the distinction is clearly invalid and without any merit. Indeed the Government in its memorandum addressed to the petition for certiorari in this case states that the decisions in *Bosch* and here "cannot fairly be reconciled."

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed and that the judgment of the district court in favor of the plaintiff should be affirmed.

Respectfully submitted,

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CONSTITUTION OF THE UNITED STATES

ARTICLE IV.

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

UNITED STATES CODE

TITLE 26. INTERNAL REVENUE CODE.

SEC. 2056. Bequests, etc., to Surviving Spouse.

(a) *Allowance of Marital Deduction.* For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) *Limitation in the Case of Life Estate or Other Terminable Interest.* —

• • •

4) Valuation of interest passing to surviving spouse. — In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section —

(A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession,

legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; and

(B) where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined.

(5) *Life estate with power of appointment in surviving spouse.* — In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse —

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest for such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

(c) *Limitation on Aggregate of Deductions.* —

(1) *General rule.* — The aggregate amount of the deductions allowed under this section (computed without regard to this subsection) shall not exceed 50 per cent of the value of the adjusted gross estate, as defined in paragraph (2).

(2) *Computation of adjusted gross estate.* —

(A) *General rule.* — Except as provided in sub-paragraph (B) of this paragraph, the adjusted gross estate shall, for purposes of subsection (c)(1), be computed by subtracting from the entire value of the gross estate the aggregate amount of the deductions allowed by sections 2053 and 2054.

(d) *Disclaimers.* —

(1) *By surviving spouse.* — If under this section an interest would, in the absence of a disclaimer by the surviving spouse, be considered as passing from the decedent to such spouse, and if a disclaimer of such interest is made by such spouse, then such interest shall, for the purposes of this section, be considered as passing to the person or persons entitled to receive such interest as a result of the disclaimer.

(2) *By any other person.* — If under this section an interest would, in the absence of a disclaimer by any person other than the surviving spouse, be considered as passing from the decedent to such person, and if a disclaimer of such interest is made by such person and as a result of such disclaimer the surviving spouse is entitled to receive such interest, then such interest shall, for purposes of this section, be considered as passing, not to the surviving spouse, but to the person who made the disclaimer, in the same manner as if the disclaimer had not been made.

(e) *Definition.* — For purposes of this action, an interest in property shall be considered as passing from the decedent to any person if and only if —

(1) such interest is bequeathed or devised to such person by the decedent;

(2) such interest is inherited by such person from the decedent;

(3) such interest is the dower or curtesy interest (or statutory interest in lieu thereof) of such person surviving spouse of the decedent;

(4) such interest has been transferred to such person by the decedent at any time;

(5) such interest was, at the time of the decedent's death, held by such person and the decedent (or by them and any other person) in joint ownership with right of survivorship;

(6) the decedent had a power (either alone or in conjunction with any person) to appoint such interest and if he appoints or has appointed such interest to such person, or if such person takes such interest in default on the release or nonexercise of such power; or

(7) such interest consists of proceeds of insurance on the life of the decedent receivable by such person.

Except as provided in paragraph (5) or (6) of subsection (b), where at the time of the decedent's death it is not possible to ascertain the particular person or persons to whom an interest in property may pass from the decedent, such interest shall, for purposes of sub-paragraphs (A) and (B) of subsec-

tion (b)(1), be considered as passing from the decedent to a person other than the surviving spouse.

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE.

SEC. 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

SEC. 1738. State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affxing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and

Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

CONSTITUTION OF THE STATE OF CONNECTICUT

Article Fifth

Of The Judicial Department

Sec. 1. The judicial power of the state shall be vested in a Supreme Court of Errors, a Superiour Court, and such inferiour courts as the General Assembly shall, from time to time, ordain and establish: the powers and jurisdiction of which courts shall be defined by law.

Sec. 2. There shall be appointed in each county, a sufficient number of justices of the peace, with such jurisdiction in civil and criminal cases, as the General Assembly may prescribe.

Sec. 3. The judges of the Supreme Court of Errors, of the superiour and inferiour courts, and all justices of the peace, shall be appointed by the General Assembly, in such manner as shall by law be prescribed. The judges of the Supreme Court, and of the Superiour court, shall hold their offices during good behaviour; but may be removed by impeachment; and the Governour shall also remove them on the address of two thirds of the members of each house of the General Assembly: All other judges and justices of the peace shall be appointed annually. No judge or justice of the peace shall be capable of holding his office, after he shall arrive at the age of seventy years.

GENERAL STATUTES OF CONNECTICUT

(Revision of 1958)

TITLE 12. TAXATION

CHAPTER 218

PRORATION OF FEDERAL AND STATE ESTATE TAXES

SEC. 12-400. *"Persons interested in the estate," defined.* For the purpose of this chapter, "persons interested in the estate" includes all persons who may be entitled to receive or who have received any property or interest which is required to be included in the gross estate of a decedent or any benefit with respect to any such property or interest whether under a will or intestacy or by reason of any of the transfers, trusts, estates, rights, powers and relinquishment of powers, as severally enumerated in the United States internal revenue code.

SEC. 12-401. *Proration of estate taxes. Procedure.* (a) When it appears from any administration account, or in any appropriate proceeding in the probate court that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity has paid a death tax levied or assessed under the provisions of chapter 217, hereinafter called the Connecticut estate tax, or under the provisions of the United States internal revenue code or under any death tax law of the United States hereafter enacted, hereinafter called the federal estate tax, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except when a testator otherwise directs in his will or when, by written instrument executed inter vivos, direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such inter vivos instru-

ment, shall, except as hereinafter provided in subsection (b), be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such proration shall be made in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate, except that, in making such proration, allowances shall be made for any exemptions granted by the act, imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate and except that, in cases where a trust is created or other provision made whereby any person is given an interest in income or an estate for years or for life or other temporary interest in any property or fund, the tax on both such temporary interest and the remainder thereafter shall be charged against and paid out of the corpus of such property or fund without apportionment between remainders and temporary estates. In all cases to which this chapter applies, except as hereinafter provided in subsection (b), the executor, administrator or other person acting in a fiduciary capacity shall include as a part of the administration account or other proceeding in the probate court a computation of the proposed proration. Before determining such proration, the probate judge shall, except as hereinafter provided in subsection (c), appoint a time and place for a hearing thereon and shall cause such notice of such hearing to be given to the parties in interest as he directs. In making the proration herein provided for, the credit allowed by the law imposing the federal estate tax for gift taxes paid, or for any estate, inheritance, legacy or succession taxes actually paid with respect to the estate to any state or territory or the District of Columbia, shall be assumed to apply pro rata to all parts of the gross

taxable estate subject to such federal estate tax. (b) If the judge of probate finds with or without a hearing thereon, from the administration account or other evidence available to and satisfactory to him, including written consents by those to whom the tax has been charged, that the federal estate tax and Connecticut estate tax, if any, as finally determined, have been paid and that the ultimate burden of such tax or taxes has been borne by a party or parties in interest in a manner satisfactory to them, or to their legal representatives, as evidenced by the written consent of such persons or of their legal representatives, no proration of the federal estate tax or Connecticut estate tax shall be made unless specially requested by any party in interest. (c) Upon receipt of the computation provided for in subsection (a), the probate judge shall make a determination of the proration of the federal estate tax, if any, in the manner provided by subsection (a), except that, if all parties affected by such proration or their legal representatives endorse upon such computation their approval thereof, no hearing need be held thereon, but such determination may be made ex parte.

SEC. 12-402. *Tax to be paid by executor or administrator.* So far as is practicable, the tax shall be paid by the executor or administrator as such out of the estate before its distribution, unless the decedent's will, if any, otherwise directs. When any property required to be included in the gross estate does not come into the possession of the executor or administrator as such, he shall recover from whoever is in possession or from the persons interested in the estate the proportionate amount of such tax payable by the persons interested in the estate with which such persons are chargeable under the provisions of this chapter, and the probate judge may by order direct the payment of such amount by such person to the executor or administrator.

SEC. 12-403. *Distribution by fiduciary.* No executor, administrator or other person acting in a fiduciary capacity shall be required to transfer, pay over or distribute any property or fund with respect to which a federal or state estate tax is imposed until the amount of such tax or taxes due from the devisee, legatee, heir-at-law, distributee or other person to whom such property is transferred is paid or, if the apportionment of tax has not been determined, until adequate security is furnished by the transferee for such payment.

SEC. 12-404. *Order directing payment of prorated amounts.* The probate judge, upon making a determination as provided in section 12-401, shall make an order directing the executor, administrator or other fiduciary to charge the prorated amounts against the persons against whom the tax has been so prorated so far as he is in possession of property or interests of such persons, and directing all other persons against whom the tax has been so prorated or who are in possession of property or interests of such persons to make payment of such prorated amounts to such executor, administrator or other fiduciary.

SEC. 12-405. *Appeal.* Any person aggrieved by any determination or order made by the probate judge pursuant to this chapter may appeal therefrom to the superior court in the same manner and with the same effect as from other orders or decrees of the probate court.

TITLE 45. PROBATE COURTS AND PROCEDURE.

CHAPTER 774

ORGANIZATION, POWERS, DUTIES AND GENERAL PROVISIONS

SEC. 45-4. *General powers.* Courts of probate in their respective districts shall have power to admit wills to probate and grant administration of intestate estates of persons who have

died domiciled in their districts and to call executors, administrators, trustees, guardians and conservators to account for and concerning the estates entrusted to their charge, and may make any lawful orders or decrees to carry into effect the power and jurisdiction conferred upon them by the several provisions contained in this title. Upon the admission of any will to probate or the appointment of an administrator of the estate of any deceased person, the court of probate shall make a finding as to the domicile of such person at the time of death, and any person interested in such estate may appeal from such finding as provided in section 45-288.

SEC. 45-7. *Judge may call assistance.* In the determination of any matter pending before a court of probate, the judge may call to his assistance any judge of the superior court or court of common pleas or any other judge of probate.

SEC. 45-9. *Validity of orders, judgments and decrees.* Every order or decree of a court of probate made by a judge who is disqualified shall be valid unless an appeal is taken therefrom, as hereinafter specified. All proper orders, judgments and decrees of courts of probate, rendered after notice and from which no appeal is taken, shall be conclusive and shall be entitled to full faith, credit and validity and shall not be subject to collateral attack, except for fraud.

SEC. 45-12. *Record books, records and supplies.* Each judge of probate shall provide suitable record books and supplies for the court in his district. He shall cause a complete record to be made in such books of all orders passed by such court, and of all wills, inventories, distributions, accounts, bonds and returns made to or lodged with such court, and the expense of such record books and of such supplies as such judge deems necessary shall be paid, upon his order, by the town or towns composing such district in proportion to their several grand lists last perfected.

SEC. 45-15. *Certification of records and files.* The records and files of any court of probate may be certified by the judge, clerk or assistant clerk thereof, any one of whom is authorized to use and affix the seal of such court, and all copies of records and files so certified, with or without the seal of such court, shall be legal evidence.

SEC. 45-24. *Connecticut probate assembly; meeting; powers and duties.* There shall be an assembly of the elected and qualified acting judges of the courts of probate to be known as the Connecticut probate assembly, of which assembly all said judges shall be members. The annual meeting of said assembly shall be held on the third Wednesday in January in the supreme court room at Hartford. Other stated meetings of said assembly shall be held as provided in its bylaws. Special meetings may be called at such times and such places as said bylaws may provide. Said assembly shall transact any business which may properly come before such meetings and which pertains to said courts and the improvement of and uniformity in their procedure and practice and may adopt bylaws to govern said assembly and the meetings thereof and shall establish uniform rules, practice and procedure in said courts, subject to the rules established by the judges of the supreme court of errors under the provisions of Section 51-14. Any uniform rules, practice and procedure so established by said assembly shall be mandatory upon all courts of probate in this state. Said assembly shall clarify and revise the probate laws of the state and prepare a simple, clear and concise schedule of probate fees to the end that the administration of justice in the courts of probate may be simplified and expedited with maximum efficiency and minimum expense.

TITLE 51. COURTS.

CHAPTER 870

JUDICIAL DEPARTMENT

SEC. 51-1. *Composition of department.* The judicial department of the state shall consist of the supreme court of errors, the superior court, the court of common pleas, the juvenile court, the town, city, borough and police courts, the trial justice courts, justice of the peace courts, the traffic court of the district of Danbury and the probate courts.

SEC. 51-2. *Chief justice as administrative director. Powers and duties.* The chief justice of the supreme court of errors shall be the administrative director of the judicial department and responsible for the efficient operation thereof and of its constituent courts as defined in Section 51-1 and for the expeditious dispatch of litigation therein and the proper conduct of the business of said courts. He may require reports from the constituent courts of the department and may issue such orders and regulations as may be necessary for the efficient operation of such courts to insure the prompt and proper administration of justice. He may assign, reassign and modify assignments of judges of the superior court and the court of common pleas to hold regular or special sessions for the transaction of civil or criminal business within their respective courts, except as hereinafter provided. If any judge of the juvenile court is unable by reason of sickness, absence or other disability to perform the duties of his office, or if there is a vacancy, the chief justice may assign a judge of the court of common pleas or any judge of a municipal court to act in his stead until he resumes his duties or a new judge is designated. Any municipal judge assigned to the juvenile court shall be compensated at the per

diem rate of forty dollars for each day of his service to said court.

SEC. 51-33. *Punishment for contempt of court.* Any court may punish by fine and imprisonment any person who in its presence behaves contemptuously or in a disorderly manner; but no justice of the peace shall inflict a greater fine than seven dollars or a longer term of imprisonment than thirty days; and no other court shall inflict a greater fine than one hundred dollars or a longer term of imprisonment than six months.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 240

THE SECOND NATIONAL BANK OF NEW HAVEN, EXECUTOR OF THE WILL OF FREDERICK F. BREWSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum decision of the district court (R. 86–107) is reported at 222 F. Supp. 446. The opinion of the court of appeals (R. 114–124) is reported at 351 F. 2d 489.

JURISDICTION

The judgment of the court of appeals (R. 124) was entered on September 28, 1965. The court of appeals denied a petition for rehearing and rehearing *en banc* on March 21, 1966 (R. 125). The petition for a writ of certiorari was filed on June 16, 1966 and was granted on December 5, 1966 (R. 126; 385 U.S. 966). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTION PRESENTED

When the resolution of an issue in a federal estate tax controversy depends upon the character or amount of a property interest owned or transferred by the decedent, and the character or amount of such interest has been determined in a non-adversary State probate court proceeding to which the United States was not a party, is the federal court conclusively bound by that decision even though it is contrary to State law?

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Constitution, the Judicial Code, the Internal Revenue Code of 1954, § 2056, the pertinent Regulations, and § 12–401 of the General Statutes of Connecticut (Rev. 1964) are set forth in the Appendix, *infra,* pp. 31–36.

STATEMENT

Decedent's will and codicil provided, in part, that one third of his residuary estate was to be held in trust for his widow; she was to receive the income during her life and had a general testamentary power of appointment over the corpus. The remaining two thirds of decedent's residuary estate were left in separate trusts for nine grandchildren (R. 16–18, 24, 34–36).

The widow's trust clearly qualified for the marital deduction; the only question is the amount of the deduction. If, under Connecticut law, the federal estate tax was payable out of the entire residue of decedent's estate, the widow's trust would be approximately $1,700,000 (1/3 of the residue *after* payment of feder-

al estate taxes) and the marital deduction attributable to the widow's trust would be limited to that amount.[1] If, on the other hand, under Connecticut law, the federal estate tax was payable only out of the grandchildren's two thirds share of the residue, the widow's trust would be approximately $3,600,000 (1/3 of the residue *before* reduction for taxes) and the marital deduction attributable to the widow's trust would equal this larger amount[2] (R. 60, 67, 69, 87–88).

Under Connecticut's proration statute, a bequest which is exempt from estate tax is not to be reduced by any portion of such tax. Therefore, if the proration statute applies, the widow's trust, being deductible for purposes of federal estate taxes, would bear no part of those taxes and the entire federal estate tax liability would be payable out of the grandchildren's share of the residue. Conn. Gen. Stat. § 12–401 (App., *infra*, pp. 33–34). That statute applies unless decedent's will contains a "clear and unambiguous" direction to the contrary. Here, decedent's will provided, in part, that "The provisions of any statute requiring the apportionment or proration of such [death] taxes among the beneficiaries of this will * * * shall be without effect" (R. 12).

Decedent's executor took the position that this provision did not clearly and unambiguously negate application of the proration statute, that (in accordance with its terms) the entire federal estate tax attributable to the residuary estate should be paid out of

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[1] See 1954 Code § 2056(b) (4); Treas. Reg. § 20.2056 (b)–4 (App. *infra*, pp. 32, 35).

[2] The estate is concededly also entitled to an additional marital deduction of over $400,000 for other property which passed from decedent to his widow (R. 56–58, 69).

the grandchildren's trusts and that no federal estate tax should be paid out of the widow's trust. The executor therefore claimed a marital deduction attributable to the widow's trust of approximately $3,600,000 (R. 60, 67, 69). The Commissioner, on the other hand, took the position that the above-quoted language in decedent's will clearly rejected application of the proration statute, that the federal estate tax was therefore payable out of residue before divisions between the widow's and the grandchildren's trusts, and that the marital deduction attributable to the widow's trust was therefore approximately $1,700,000 (R. 40, 69).

After receipt of the 30-day letter stating the Commissioner's position, petitioner filed an application in the Connecticut probate court seeking a determination that it was proper to allocate the entire tax liability to the grandchildren's trusts (R. 26–38, 88). Notice of hearing on this application was given to the widow, to the District Director of Internal Revenue (who did not appear), to adult beneficiaries of the grandchildren's trusts, and to a guardian *ad litem* representing the minor grandchildren (R. 34–35, 80–81, 82, 88). The guardian *ad litem,* an attorney, filed a memorandum stating that if the tax were to be allocated under the proration statute, the trusts created for his wards would bear "substantially the entire tax" (R. 79). Nevertheless, he stated that he had "no objection to the granting of the Executors' Application for the Proration of the Federal Estate Tax" (R. 80). So far as the record shows, no one opposed the executor's application. After a hearing at

which only the guardian *ad litem* and the executor's attorneys were present, the probate court filed a memorandum of decision which—without mentioning the language in the decedent's will that the "provisions of any statute requiring * * * proration of such taxes * * * shall be without effect"—followed the only position urged by the parties and held that the proration statute applied, on the ground that the decedent's will did not unambiguously direct otherwise (R. 81–82).

Petitioner paid a deficiency of $1,333,194, plus interest, brought suit for a refund, and moved for summary judgment (R. 6–11, 47–48). The United States opposed summary judgment on the ground that there was a genuine issue of material fact, *i.e.*, whether or not the Connecticut probate court proceedings had been adversary in nature.[3] The federal district court held that it was not bound by the Connecticut probate court's determination in any event but granted summary judgment for petitioner on the ground that decedent's will had not, in fact, negated application of the proration statute (R. 94–107).

The court of appeals reversed. It first examined the State law question and concluded that decedent's will "would seem to be clear and unambiguous to the effect that taxes were to come out of his residual estate and that despite any contrary statute the testator specifically wished to avoid any proration" (R. 116). It then held that the State probate court decree was not conclusively binding in the instant case regard-

[3] R. 83, 105; Brief for the Defendant in Opposition to Plaintiff's Motion for Summary Judgment, pp. 39–54.

less of whether the State proceedings had been adversary "or non-adversary in nature" (R. 123). The court of appeals denied a petition for rehearing and rehearing *en banc* (R. 125).

INTRODUCTION AND SUMMARY OF ARGUMENT

The instant case and the companion *Bosch* case (No 673, this Term), present the question whether a taxpayer can, by obtaining an erroneous decree from a State trial court in a non-adversary proceeding, bind the Commissioner on an issue of State law on which a federal tax dispute turns. As we discussed at length in our *Bosch* brief (a copy of which has been served on petitioner), there are three principal approaches to this question. For reasons stated in that brief, we urge this Court to adopt the non-adversary approach.

Petitioner's argument that this Court is precluded from adopting the non-adversary approach by the full faith and credit clause is without merit. The federal court would not be required to give the State probate court judgment more effect than it would be given by Connecticut, and Connecticut would not treat the type of probate court judgment which is involved in this case as binding on the State tax authorities. In any event, the full faith and credit clause does not preclude the federal court from reexamining the underlying determinations on which the ultimate *in rem* decree was based. The probate court decree is conclusive on a non-party like the United States as to the ultimate determination contained in the judgment—*i.e.*, who owns the estate's assets. It cannot bind the United States, which was not a party, as to underlying de-

terminations such as how and when ownership of these assets was acquired by the respective beneficiaries—the issues on which federal tax liability turns.

The district court decided this case on summary judgment without receiving evidence on the question whether the Connecticut probate court proceeding was non-adversary. Therefore, although the record as it stands makes it clear that the probate proceeding was non-adversary—in the sense that all the parties urged the same result and there was no full and fair presentation of both sides of the issue—we suggest that if this Court adopts the non-adversary approach, this case should be remanded for findings on the non-adversary issue.

ARGUMENT

I

IN DECIDING AN ESTATE TAX CONTROVERSY, A FEDERAL COURT IS NOT BOUND BY AN ERRONEOUS STATE PROBATE COURT DETERMINATION RENDERED IN A NON-ADVERSARY PROCEEDING TO WHICH THE UNITED STATES WAS NOT A PARTY

A. THE NON-ADVERSARY APPROACH IS CORRECT

Both the district court and the court of appeals in this case held that, in light of the peculiar nature of the Connecticut probate court, the decree obtained by petitioner was not conclusive for federal tax purposes regardless of whether the State proceeding was adversary or non-adversary (R. 102–107, 114–124). This rationale is consistent with the so-called *Erie* approach (*Erie R. Co.* v. *Tompkins*, 304 U.S. 64) under

which the federal court is never bound by a decision of a State trial court. (See our brief in the Bosch case, pp. 20–27.) Indeed, the court of appeals' analysis of the status of the probate court in the Connecticut judicial system is strikingly similar to the analysis in *King* v. *Order of Travelers,* 333 U.S. 153, where this Court declined to follow a State trial court decision obtained by one party to the federal action because the State court did not appear (p. 161) "to have such importance and competence within [the State's] * * * own judicial system that its decisions should be taken as authoritative expositions of that State's 'law'."[4]

Although, as indicated in our *Bosch* brief, there is support in logic and the decided cases for the *Erie* view, we urge the Court to adopt the non-adversary approach because it is supported by clear indications of Congressional intent, by the pertinent policy considerations, by long-standing Treasury Regulations, by this Court's decision in *Freuler* v. *Helvering,* 291 U.S. 35, and by the decisions of a majority of the courts of

[4] While Connecticut probate courts are regarded as courts of record, as petitioner correctly points out (Br. 27–28), their decisions are not published or digested in any form whatsoever. They are filed only in the books of the rendering probate court (of which there are 123 throughout the State), and even there the sole index appears to be by the name of the estate. Locke & Kohn, *Connecticut Probate Practice*, vol. 1, § 17, pp. 32–33, Thus, neither the same court nor coordinate courts are expected to give the unpublished decisions precedential weight in subsequent cases. And the trial of appeals from the probate court is completely *de novo*. *Heiser* v. *Morgan Guaranty Trust Co.*, 150 Conn. 563, 565–566, 192 A. 2d 44, 45–46; *Lockett* v. *Doyle*, 148 Conn. 639, 643–644, 173 A. 2d 507, 508. (Compare this statement of the status of Connecticut probate courts with the discussion in *King*, *supra*, pp. 160–161.)

appeals; and because it eliminates the potential unfairness inherent in both polar positions and achieves an appropriate accommodation of the respective roles of the federal and State courts in resolving tax controversies. Our reasons for this position are set forth at length in the *Bosch* brief (pp. 13–31); we merely summarize them here.

The non-adversary rule rests on the premise that Congress did not intend the federal fisc and the federal courts to be bound by non-adversary State trial court decisions in which there was no genuine controversy between the parties and no full and fair presentation of both sides of the issue on which the federal tax liability turns. We submit that this premise is preeminently sound.

The legislative history of the marital deduction provisions indicates that "proper regard should be given to interpretations of the will rendered by a court," not in every case, but only in those cases where the interpretation resulted from "a *bona fide adversary proceeding.*" S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 4 (1948–1 Cum. Bull. 331, 334) (emphasis added).[5]

Moreover, until the enactment of a recent and lim-

[5] The Committee Report also provides that "any interest received by the surviving spouse under a settlement which does not reflect her rights under the local law does not pass to the surviving spouse from the decedent." *Ibid.* No distinction is drawn between in court and out of court settlements. See also the long standing Treasury Regulations discussed in text, *infra*, p. 10. Accordingly, if legatees agree to give the surviving spouse more than passed to her under the will, the settlement cannot affect decedent's federal estate tax liability.

ited amendment,[6] even a disclaimer of property by a legatee in favor of the surviving spouse could not serve to increase the marital deduction. 1954 Code, § 2056(d)(2). Congress could not have intended the marital deduction to be augmented if a legatee disguised his disclaimer by participating in a non-adversary State trial court proceeding in which he voluntarily relinquished rather than asserted his rights under the decedent's will.

The Treasury Regulations have, since 1919, indicated that the government cannot be bound by an erroneous non-adversary State court decree involving no "active and genuine contest." And the marital deduction Regulations, since their promulgation in 1949, have indicated that the government is not bound by a consent decree, but strongly suggest that it is bound by a "decision of a local court upon the merits in an adversary proceeding following a genuine and active contest."[7]

Furthermore, this Court's decision in *Freuler* implies that a State trial court proceeding in which (p. 45) "all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax" would not be conclusive for federal tax purposes. Following this lead, a majority of the courts of appeals have declined to give conclusive effect to er-

[6] See footnote 14, p. 16 of our *Bosch* brief.

[7] Treasury Regulations (1954 Code), §§ 20.2053–1(b)(2), 20.2056(e)–2(d)(2) (Appendix, *infra*, pp. 34–35, 36), discussed in the *Bosch* brief, pp. 16–18.

roneous State court decrees that resulted from non-adversary proceedings.[8]

The non-adversary rule is also supported by compelling practical and policy considerations. It avoids the potential unfairness that is present under both polar positions. Under the rule that any state court decree is binding on the government (the so-called *Gallagher* rule), the government is bound by an erroneous State trial court decree resulting from a non-adversary proceeding—to which it was not a party and in which there was no fair presentation of the position it advocates—brought for the purpose of reducing estate taxes. Under the *Erie* rule, the litigant who vigorously but unsuccesfully asserts a position in an adversary State court proceeding is required to appeal to the highest State court if he is to foreclose

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[8] The cases upon which petitioner relies are primarily from the Third Circuit, the only circuit which has clearly rejected the government's view.

Petitioner also relies on decisions of the Fourth and Sixth Circuits, which have now adopted the non-adversary rule. See *Pierpont* v. *Commissioner*, 336 F. 2d 277, 281 (C.A. 4), certiorari denied, 380 U.S. 908 (erroneous State court decree not followed "In view of the * * * nonadversary character of the [State] proceedings"); *Old Kent Bank and Trust Co.* v. *United States*, 362 F. 2d 444 (C.A. 6) (federal court "not conclusively bound" by "nonadversary Probate court proceedings").

Finally, petitioner cites district court cases, most of which are not viable within their own circuits. See *Merchant's National Bank & Trust Co.* v. *United States*, 246 F. 2d 410, 417 (C.A. 7) (nonadversary probate court decree not binding); *Faulkerson's Estate* v. *United States*, 301 F. 2d 231, 232 (C.A. 7), certiorari denied, 371 U.S. 887; *Peyton's Estate* v. *Commissioner*, 323 F. 2d 438 (C.A. 8).

the possibility that a federal court will impose estate taxes as if he had prevailed in the State proceeding. The non-adversary approach, however, achieves a salutary accommodation of the competing State and federal interests.

B. THE FULL FAITH AND CREDIT CLAUSE DOES NOT REQUIRE THAT THE PROBATE COURT DECREE BE GIVEN CONCLUSIVE EFFECT IN THIS FEDERAL TAX CASE

In arguing that the probate court decree is conclusive in this proceeding, petitioner neither discusses the controlling factor of congressional intent nor considers the pragmatic and policy considerations that call for adoption of the non-adversary rule. Rather, petitioner relies on formal doctrine, urging that the probate court judgment is *in rem* and that the United States, although it was not a party, is bound under the full faith and credit clause (R. 30–33, 39).

Although, as we demonstrate below, the full faith and credit clause is not applicable in the instant case, it is clear that even if it did apply petitioner would not prevail. The full faith and credit clause and the implementing legislation (Constitution, Art. IV, Sec. 1; 28 U.S.C. 1738, App., *infra*, p. 31) never require a federal court to give a decree more effect than the State where the judgment was rendered would give it. The Supreme Court of Connecticut has held that the Connecticut tax authorities are not bound by a Connecticut probate court decree resulting from an agreement between the parties, reasoning that such a rule "avoids the possibility of compromise agreements designed to avoid a succession

tax." *Emanuelson* v. *Sullivan*, 147 Conn. 406, 410 161 A. 2d 788, 790 (1960). Since Connecticut does not treat such a decree as binding in a subsequent State tax suit, the full faith and credit clause does not require the federal court to follow it in a federal tax case.

Moreover, the full faith and credit clause does not apply here. Petitioner is seeking an *in personam* money judgment against the United States. Since an *in rem* judgment does no more than determine the respective ownership interests of all persons in the *res*, it is not binding with respect to other issues in an *in personam* proceeding against a person who was not a party to the *in rem* proceeding. The Restatement of *Judgments* provides that although an *in rem* judgment "is conclusive upon all persons as to interests in the thing," it "will not bind anyone personally unless the court has jurisdiction over him, and it is not conclusive as to a fact upon which the judgment is based except between persons who have actually litigated the question of the existence of the fact."[9] The probate court decree is thus a conclusive determination only as to who owns the assets of the estate.

The probate court neither purported, nor did it have power, to decide the estate's *in personam* federal tax liabilities. And since the United States was not a party, it is not bound in later *in personam* tax liti-

[9] Restatement of Judgments (1942), § 73; see, *e.g.*, *id.*, § 75(2); *Freeman* v. *Anderson*, 119 U.S. 185; *Headen* v. *Pope & Talbot, Inc.*, 252 F. 2d 739, 744–745 (C.A. 3); *Harris* v. *Weed*, 89 Conn. 214, 221–224, 93 Atl. 232, 235.

gation by the underlying determinations upon which the ultimate *in rem* decree was based. As explained in our *Bosch* brief (fn. 21, p. 26), the probate decree settles once and for all who owns the decedent's assets (just as it would if the probate court had merely confirmed a voluntary transfer of rights between beneficiaries, *i.e.*, a gift). But it cannot settle, as against the United States, which was not a party, how and when ownership of these assets was acquired by the respective beneficiaries, *i.e.*, it cannot determine as against a non-party whether ownership of these assets passed to the beneficiaries from decedent at the moment of his death (as reqired by § 2056(e) and *Jackson* v. *United States,* 376 U.S. 503, if a marital deduction is to be allowed), or whether ownership passed to them from other beneficiaries who voluntarily relinquished their rights (in which case no deduction is allowed).

For example, assume that over a ten year period A and B, who are New York residents, have removed all the oil from a piece of desolate Oklahoma land, and that there is a dispute as to which of them inherited the land from C ten years before. A brings an *in rem* proceeding in Oklahoma to quiet title to the land, but because it is now almost valueless, B, who is not subject to the Oklahoma court's jurisdiction, does not appear. The Oklahoma court finds that A inherited the land from C ten years before and quiets A's title to the land. A then brings an *in personam* damage suit against B in New York for the value of the oil removed from the land over the past ten years by B. B defends on the ground that he, rather than A,

inherited the land from C, and B counterclaims for the value of the minerals removed by A. We submit (1) that A is—after the date of the *in rem* judgment—the owner of the land and, assuming that there was proper notification and publication, the full faith and credit clause bars another State from relitigating the question of such ownership, but (2) that A cannot use the *in rem* decree as the basis for obtaining an *in personam* money judgment against B, or as a defense to B's *in personam* counterclaim. Moreover, the State of Oklahoma, which, like B, was not a party to the *in rem* proceeding, is not prevented from seeking an *in personam* judgment for real estate taxes from B for the years before the judgment.[10]

This legal proposition—that underlying determinations on which an *in rem* judgment is based are not binding on a non-party in a later *in personam* suit—is especially applicable in a case like this one. Here, the *in rem* proceedings were non-adversary in nature,

[10] Here petitioner is attempting to use the *in rem* judgment affirmatively to obtain an *in personam* money judgment against the United States. If, instead of paying the tax and suing for a refund in the district court, petitioner had brought a suit in the Tax Court for a redetermination of the deficiency, petitioner would still be attempting to use the *in rem* judgment affirmatively in a suit which he was prosecuting against the United States. Internal Revenue Code of 1954, § 6213(a); Tax Court Rules of Practice, Rule 6. In any event, as we point out in the text, a person may not use an *in rem* judgment either affirmatively or defensively in a later *in personam* suit against a non-party to the earlier proceeding. In addition to the authorities cited *supra*, fn 9, p. 13, see *Smith* v. *Great Atlantic & Pacific Tea Co.*, 170 F. 2d 474 (C.A. 8); *McQuillen* v. *Dillon*, 98 F. 2d 726, 729 (C.A. 2), certiorari denied, 305 U.S. 655; *Sherman* v. *Jacobson*, 247 F. Supp. 261, 266–267 (S.D.N.Y.).

the State court could not have acquired jurisdiction over the United States, and the legitimate interests of the federal government in the proper administration of the federal tax laws would be defeated if the federal fisc were bound by post-mortem intra-family property dispositions. As this Court has noted, "those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy * * *" and especially where the issue was not "squarely litigated in a truly adversary proceeding." *Williams* v. *North Carolina,* 325 U.S. 226, 230 and fn. 6.[11]

Moreover, to accept the effect of *in rem* judgments as urged by petitioner would cause tax consequences to turn on a distinction between *in rem* and *in personam* judgments which is totally irrelevant to the administration of the federal tax laws. It is clear that a prior *in personam* judgment to which the United States was not a party is not entitled to full faith and credit as against it in a federal tax action. In *Freuler* v. *Helvering,* 291 U.S. 35, 43, this Court said that such a judgment "[o]bviously * * * had

[11] As to the application of full faith and credit against the United States or a State, see also *Riley* v. *New York Trust Co.*, 315 U.S. 343, 355–356; *Durfee* v. *Duke*, 375 U.S. 106, 115–116; *Land* v. *Dollar*, 330 U.S. 731; *Emanuelson* v. *Sullivan*, 147 Conn. 406, 161 A. 2d 788.

As to the significance of the legitimate interests of the forum, see also *Estin* v. *Estin*, 334 U.S. 541; *Emanuelson* v. *Sullivan, supra;* cf. *Watson* v. *Employers Liability Corp*, 348 U.S. 66, 73; *Pacific Ins. Co.* v. *Industrial Accident Comm'n*, 306 U.S. 493, 501–502; *Alaska Packers Ass'n* v. *Industrial Accident Comm'n of California*, 294 U.S. 532, 547.

not the effect of *res judicata,* and could not furnish the basis for the invocation of the full faith and credit clause." To allow an *in rem* judgment to have such effect would permit the tax consequences of a State court determination—*e.g.,* that a widow possessed a general testamentary power of appointment—to turn on whether that determination was rendered in an *in personam* action brought by the widow or trustee (as in the *Bosch* case) or in an *in rem* action for the probate of the donor's will (as in the instant case).[12]

There is no basis for imputing to Congress any intention to make federal estate tax consequences turn on such a distinction. Indeed, as pointed out above

[12] In view of the above quoted statement, petitioner's reliance on *Frueler* to support its full faith and credit argument (Br. 30–31) is misplaced. The remaining six decisions of this Court upon which it relies (Br. 30–31) are also inapposite. In three of those decisions, full faith and credit was not even mentioned. *Uterhart* v. *United States*, 240 U.S. 598; *Blair* v. *Commissioner*, 300 U.S. 5; *Helvering* v. *Stuart*, 317 U.S. 154. Two of the other cited decisions involved the effect that should be given to a former judgment rendered as between the same parties. *American Surety Co.* v. *Baldwin*, 287 U.S. 156; *Durfee* v. *Duke*, 375 U.S. 106.

The last case, *Tilt* v. *Kelsey*, 207 U.S. 43, held that in the absence of an attack on a New Jersey probate court's jurisdiction, a stranger to that suit (the State of New York), could not assert claims against the executor and beneficiaries after the probate court had made complete distribution of the assets and exonerated the executor and beneficiaries from liability. The Court rested this decision on the finality of the New Jersey probate court's action in making complete distribution of the assets and rendering a final accounting and upon New York's failure to step forward with its claim until long after the expiration of the period for the filing of claims. Here, however, so far as the record shows, the probate court has neither ordered final distribution of the assets, nor has it held a final accounting; on the contrary (as is typical in these cases), these steps have apparently been post-

and as discussed more fully in our brief in *Bosch*, all indications support the conclusion that Congress intended the tax effect of a State trial court decree to turn on whether it resulted from "a bona fide adversary proceeding." S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., p. 4 (1948–1 Cum. Bull. 331, 334).

Thus, under the full faith and credit clause an *in rem* judgment can do no more than determine the ownership of decedent's property; it can not bind the United States, which was not a party, on underlying determinations such as how and when the beneficiaries received the property—on which the federal tax consequences depend. However, we believe that Congress intended the federal tax authorities to give a judgment rendered by a State trial court in "a bona fide adversary proceeding"—whether *in rem* or *in personam*—more effect than the full faith and credit clause requires, *i.e.*, where the State trial court proceeding involved a genuine controversy and the par-

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poned until the federal government's timely made tax claims are resolved. Moreover, in the later case of *Riley* v. *New York Trust Co.*, 315 U.S. 343, this Court recognized that a Georgia *in rem* probate judgment to which the State of New York was not a party could not be used to prevent New York from collecting taxes in a later proceeding brought in Delaware. The majority reasoned that the Delaware courts were not required to give full faith and credit to a Georgia decree awarding decedent's personalty located in Delaware when to do so would bar a stranger to the decree from later asserting his rights to such personalty (pp. 353–354). The concurring opinion by Justice Stone, joined by Justices Frankfurter and Jackson, agreed with the result reached by the majority but on the single ground that the New York administrator who was not a party to the Georgia proceeding could not be bound; otherwise, New York would be improperly foreclosed from litigating its right to collect taxes (pp. 355–356).

ties made a full and fair presentation of both sides of the issue, we believe that the federal courts must follow, for tax purposes, the underlying determinations necessary to the State court's judgment even though not required to do so by the full faith and credit clause.[13]

II

THE CASE SHOULD BE REMANDED FOR A FINDING ON WHETHER THE INSTANT STATE PROBATE COURT PROCEEDINGS WERE NON-ADVERSARY

The ultimate issue in this case is the amount of the marital deduction available to decedent's estate.

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[13] The full faith and credit clause gives Congress the power to regulate the "effect" to be given State judgments. Moreover, it is not the full faith and credit clause of the Constitution but a federal statute (28 U.S.C., § 1738, Appendix, *infra*, p. 31) which requires a federal court to recognize the judgments of a State court.

We have found six district court decisions dealing with the question whether the Social Security Administration is bound by a State trial court decree that determined a claimant's marital status. In *Miller* v. *Ribicoff*, 198 F. Supp. 819 (E.D. Mich.), *Nigro* v. *Hobby*, 120 F. Supp. 16 (D. Neb.), and *Marek* v. *Flemming*, 192 F. Supp. 528 (S.D. Tex.), the courts held that the Social Security Administration, which had not been a party to non-adversary State trial court proceedings was not bound thereby. In *Zeldman* v. *Celebrezze*, 252 F. Supp. 167 (E.D. N.Y.), *Starace* v. *Celebrezze*, 233 F. Supp. 452 (W.D. Pa.) and *Collins* v. *Celebrezze*, 250 F. Supp. 37 (S.D. N.Y.), the district courts concluded that similar State trial court decrees were binding on the Administration; the court in *Zeldman*, after "extensive research" into the legislative history of the Social Security Act, found no contrary congressional intent. 252 F. Supp. at 170. In addition to the obvious differences in policy considerations between the social security and tax areas, there is, as we have shown throughout, a strong congressional policy against binding federal tax authorities by non-adversary judgments.

If (as the government contends) decedent's will negated application of the State proration statute, then the federal estate tax would be paid out of the residue, both the widow's and the grandchildren's trusts would be reduced proportionately, and the marital deduction attributable to the widow's trust would be approximately $1,700,000 (R. 69).[14] If, on the other hand (as petitioner contends), decedent's will does not negate the proration statute, then the grandchildren's trusts would bear the entire burden of the tax, the widow's trust would bear none, and the marital deduction attributable to the widow's trust would be approximately $3,600,000 (R. 69).

The Connecticut proration statute applies unless the decedent's will clearly provides to the contrary. The Commissioner took the position that decedent's will negated application of the proration statute—and the court of appeals below agreed.

The record shows that the Connecticut probate court's contrary decision (R. 80–82) was made in a nonadversary proceding instituted in an effort to avoid estate taxes. Less than a month after the executor received written notice of the Commissioner's position, it petitioned the probate court to allocate estate taxes in accordance with the State proration statute (R. 26–27, 7–8). As the probate court noted, "the effect [of the executor's proposal] * * * is to relieve the residuary trust fund for the benefit of the widow of any part of federal estate taxes attributable to the residuary estate" (R. 81), and to impose the entire federal estate tax burden (of approximately $3,800,-

[14] See *supra*, pp. 2–3 and fn. 1, p. 3.

000 (R. 35)) on the grandchildren's trusts (R. 82). The decedent's two adult grandchildren received notice but did not appear at the hearing (R. 34–35, 76–77, 82, 88). The seven minor grandchildren were represented by a guardian *ad litem*, who filed a memorandum stating that if the tax were to be allocated as proposed by the executor, the trusts created for his wards would bear "substantially the entire tax." Nevertheless, he did not oppose that result; rather, after citing only one Connecticut case, he stated that he had "no objection to the granting of the Executors' Application for the Proration of the Federal Estate Tax" (R. 78–80). On the same day that the probate court received the guardian's memorandum, it rendered its decision approving the uncontested proration as proposed by the executor (R. 78, 82).

In the district court petitioner moved for summary judgment; the government opposed on the ground, *inter alia*, that there was a genuine issue of material fact—the non-adversary nature of the probate court proceedings—and affirmatively alleged in its answer that the probate court decree "was the result of a proceeding which was collusive and/or nonadversary in nature."[15] The district court concluded that "upon the record before it," it was "not able to make a finding as to whether the proceedings in the Probate Court were collusive or nonadversary in nature" (R. 105). However, it granted summary judgment on the ground that petitioner's interpretation of Connecticut law was correct. The court of appeals reversed

[15] R. 83; Brief for the Defendant in Opposition to Plaintiff's Motion for Summary Judgment, pp. 39–54.

on this point (which we discuss *infra* pp. 22–29), but agreed with the district court that "it was unnecessary to make a finding" as to the non-adversary nature of the probate court proceedings—because the court of appeals concluded the probate court decree would not bind the government in any event.[16] (R. 123.) Since the courts below did not specifically address themselves to the non-adversary question, this case should be remanded for appropriate findings.[17]

III

DECEDENT'S WILL CLEARLY NEGATED APPLICATION OF THE CONNECTICUT PRORATION STATUTE

The petition for a writ of certiorari in this case presented two questions—(1) whether the State probate court decree was conclusively binding on the

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[16] We pressed the non-adversary theory before both the district court and the court of appeals, urging the district court to deny summary judgment and the court of appeals to reverse the district court's grant of summary judgment because of the disputed factual issue as to whether the probate court proceeding was adversary. Consequently, there is no basis for the statement in petitioner's brief (Br. 34–35) that "the Government * * * should not be permitted at this late date to assert that a question of fact still exists."

[17] Petitioner claims that the government should have the burden of proving that the State court proceedings were non-adversary (Br. 34). However, since (1) petitioner is asserting the State court decree affirmatively as a bar to the federal court's examination of the State law issue, (2) the facts regarding the nature of the State court proceeding in which it participated are more readily available to it, and (3) the burden of proving all of the factual elements necessary to a tax refund is on the taxpayer, it would be more in accord with the normal burden of proof rules to place on petitioner the burden of proving that the State court proceeding was adversary. See *Salisbury v. United States*, 199 F. 2d 578, 580 (C.A. 5).

federal court in this tax case, and (2) even if it is not, whether the court of appeals was incorrect in holding that decedent's will clearly negated application of the Connecticut proration statute (Pet. 3). The government acquiesced in the request for certiorari only as to the former question and opposed certiorari on the State law question on the ground that the court of appeals' decision was correct and "even if it were not, interpretation of this particular language used in decedent's will presents solely an issue of State law and no issue of general importance warranting review by this Court" (Mem. 5, 6). Since in granting certiorari this Court did not limit the issues (R. 126), we shall briefly discuss the State law question in order (1) to show that the court of appeals was correct and (2) to illustrate the dangers of permitting non-adversary State trial court proceedings to control the resolution of federal tax controversies.

Decedent's will contains a "clear and unambiguous" direction against proration.[18] The two sentences

[18] The Connecticut proration statute, enacted in 1945, was designed to alter the then-existing rule that death taxes were payable out of the residuary estate absent a testamentary direction to the contrary. *Union and New Haven Trust Co.* v. *Sullivan*, 142 Conn. 685, 116 A. 2d 908 (1955). That rule caused residuary legatees, who often were members of testator's family, to pay the estate taxes attributable to specific, preresiduary bequests and thus to have their shares drastically reduced, contrary to the probable intention of testators. The proration statute is based on the principle that death taxes should be paid pro-rata by those who receive taxable bequests, whether shares of the residuary estate or specific bequests. Of course, a testator may desire that death taxes (like other debts) be paid out of the residue of his estate before it is divided into

in his will dealing with payment of taxes provide that (R. 12):

> One: I direct my executors * * * to pay out of my estate my just debts and funeral expenses and any death taxes * * *. The provisions of any statute requiring the apportionment or proration of such [death] taxes among the beneficiaries of this will or the transferees of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate.

Decedent's will thus contains both an express instruction against proration of death taxes and a specific direction that "any statute requiring * * * proration of * * * such taxes * * * shall be without effect." It is difficult to conceive of any clearer and more unambiguous direction on the subject. None of the cases relied on by petitioner (Br. 16–26) involved an express direction against proration.[19] We have found no Con-

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the specified residuary shares; thus Connecticut permits a testator to direct that the proration statute not apply to his estate, provided that the testamentary direction against application of the proration statute is "clear and unambiguous." *Jerome* v. *Jerome*, 139 Conn. 285, 289; 93 A. 2d 139, 141 (1952); *New York Trust Co.* v. *Doubleday*, 144 Conn. 134, 128 A. 2d 192 (1956); Conn. Gen. Stat. (Rev. 1954) § 12-401 (App., *infra*, pp. 33–34).

[19] The cases cited by petitioner held that the following general language was too ambiguous to negate proration: *New York Trust Co.* v. *Doubleday*, *supra*, p. 141, 128 A. 2d pp. 195–196 ("I direct my executors to pay from my residuary estate 'all * * * death taxes' "); *Jerome* v. *Jerome*, *supra*, p. 290, 93 A. 2d, p. 142 (direction to executrices "to pay all of my just and lawful debts, funeral and testamentary expenses"); *McLaughlin* v. *Green*, 136 Conn. 138, 146, 69 A. 2d 289, 293 (1949) ("I * * * direct the payment of all [death] taxes from

necticut case in which an express direction against proration was held to be unclear or ambiguous.[20]

Petitioner argues that this express direction against proration is not sufficiently clear for two reasons. First, petitioner claims that there is an inconsistency between the first and second sentences quoted above. In the first sentence testator directed that death taxes be charged against the residue and not against nonresiduary legatees. Petitioner argues that the second sentence is contradictory because it provides that death taxes are not to be paid by the beneficiaries (which would include residuary legatees) (Br. 24–26). However, the second sentence does not (as petitioner contends) provide that the residuary legatees are "not to be held for the 'ultimate payment' of death taxes" (Br. 24). Rather, it directs that "any statute [*i.e.*, the proration statute] requiring * * * the ultimate payment of such [death] taxes" by the beneficiaries

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my residuary estate"); *Guaranty Trust Co.* v. *New York City Cancer Committee*, 145 Conn. 542, 548, 144 A. 2d 535, 538 (1948) ("I direct that [all death taxes] * * * be paid out of my residuary estate"); *Morgan Guaranty Trust Co.* v. *Huntington*, 149 Conn. 331, 334–335, 179 A. 2d 604, 607 (1962) ("I direct the payment by my executors from the capital of my residuary estate of any and all [death taxes] * * * levied on my estate"); *Matter of Shubert*, 10 N.Y. 2d 461, 474, 225 N.Y.S. 2d 13, 21, 180 N.E. 2d 410, 417 (1962) ("I direct that all [death taxes] * * * shall be paid out of my residuary estate"); *Matter of Duryea*, 277 N.Y. 310, 317, 14 N.E. 2d 369, 371 (1938) ("I direct that all [death taxes] * * * be paid out of my residuary estate and that all the foregoing gifts, legacies and devises shall be free from * * * such taxes").

[20] In fact, in *Crump* v. *Crump*, 20 Conn. Supp. 471, 140 A. 2d 143 (1957), the court upheld a direction against proration which was less specific than the one in this case.

shall be inapplicable—an entirely different proposition. Thus, the first sentence allocates taxes to the residue, and the second makes ineffective any statute which provides for proration of taxes among beneficiaries.

Second, petitioner points out that less than a month after decedent executed his will in 1958, he executed a codicil (R. 23–25), giving his wife a general testamentary power over the corpus of the widow's trust (R. 24). The codicil contains no language even suggesting any change in testator's prior direction against proration. Indeed, it states that "In all other respects I hereby republish and confirm my said will" (R. 24). Nevertheless, petitioner claims that it is uncertain whether testator intended his prior direction against proration to apply. Petitioner argues that only *after* execution of the codicil did the bequest of one-third of the residue to his widow qualify for the marital deduction and, thus, only then did the application of the proration statute to the residuary legatees become important.

However, it is clear that decedent's original will negated application of the proration statute, and no intent to alter this direction is expressed or implied by his subsequent codicil. Following established principles of will construction, the testator's express direction against proration would apply to codicillary gifts,[21] even without the clear statement in the codicil

[21] A will and a codicil are to be construed as part of the same instrument. *Meriden Trust & Safe Deposit Co.* v. *Spencer*, 127 Conn. 261, 16 A. 2d 349 (1940); *Colonial Trust*

that testator republishes and confirms his original will except as to those specific changes made by the codicil.[22] In the face of such clear testamentary language the Connecticut courts will not speculate upon the testator's intent.[23]

Even if Connecticut gave effect to imputed intentions, there is no basis for petitioner's claim that testator intended (Br. 26) "that his widow and his estate should have the full benefit of the marital deduction." Even as petitioner interprets the will, decedent's widow would receive only one-third of the residue, which is substantially less than the maximum allowable deduction of one-half of the adjusted gross estate. Moreover, decedent's will bequeathed one-

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Co. v. *Perry*, 118 Conn. 357, 172 Atl. 857 (1934); *Griffith* v. *Adams*, 106 Conn. 19, 33, 137 Atl. 20, 25 (1927).

Moreover, all provisions of a will should, so far as possible, be harmonized and given operative effect. *Cumming* v. *Pendelton*, 112 Conn. 569, 574, 153 Atl. 175, 177 (1931); *Reaney* v. *Wall*, 134 Conn. 663, 60 A. 2d 505 (1948); *Hoenig* v. *Lubetkin*, 137 Conn. 516, 79 A. 2d 278 (1951).

Finally, the fact that a codicil could have changed provisions of testator's will and did not is compelling evidence that testator intended no such change. *Griffith* v. *Adams*, 106 Conn. 19, 33, 137 Atl. 20, 25 (1927).

[22] There is no basis for petitioner's assertion that testator (Br. 21) "did not speak to that matter [proration as it applies to the residuary gifts] at all." He spoke clearly against proration as to "beneficiaries of this will." The plain and ordinary meaning of "beneficiaries" would include residuary legatees, as petitioner apparently admits (Br. 25).

[23] See *Swole* v. *Burnham*, 111 Conn. 120, 149 Atl. 229 (1930); *Bankers Trust Co.* v. *Pearson*, 140 Conn. 332, 345, 99 A. 2d 224, 230 (1953); *Auchincloss* v. *City Bank Farmers Trust Co.*, 136 Conn. 266, 269, 70 A. 2d 105, 107 (1949); *First National Bank & Trust Co.* v. *Baker*, 124 Conn. 577, 582, 1 A. 2d 283, 286 (1938).

third of the residue to his widow and two-thirds to his grandchildren; there is nothing to indicate that decedent intended, merely by qualifying the widow's trust for the marital deduction, to increase its corpus disproportionately to the rest of the residue. The fact that testator gave his grandchildren twice as much of the residue as he gave his widow hardly supports petitioner's argument that testator wished to favor his widow at the expense of his grandchildren by having the entire amount of federal estate tax (approximately $3,800,000 (R. 35)) fall on them and none on her.

As the court of appeals concluded (R. 116, 122):

> * * * The direction and intent set forth in paragraph "ONE" would seem to be clear and unambiguous to the effect that taxes were to come out of his residual estate and that despite any contrary statute the testator specifically wished to avoid proration.
>
> * * * * *
>
> The courts would indeed be making a new will for the testator if paragraph "ONE" were to be interpreted as a direction that federal estate taxes not be paid "out of my estate" but that they be borne solely by the "two-thirds" trusts for the grandchildren. The codicil shows a desire to qualify one-third of the residue as a marital deduction. It does not disclose an intention to have this part of the residue in effect tax free and grossly disproportionate to the other two-thirds. That which the testator did not choose to do during his lifetime the courts should not do after his death.

So far as the record shows, none of the parties to the probate court proceeding made the contentions or cited the cases discussed and cited in this portion of our brief, even though the grandchildren stood to have (and did have) their share of the residue reduced by $3,800,000. They apparently were more concerned with saving more than $1,000,000 in federal estate taxes for the family. Thus, the Connecticut probate court action was brought not to resolve any controversy between the legatees but in an effort to determine a federal tax controversy in a non-adversary State court proceeding.

CONCLUSION

If, as we urge, this Court adopts the non-adversary approach, the judgment below should be vacated and the case remanded for further proceedings. If this Court adopts the *Erie* approach, the judgment below should be affirmed.

Respectfully submitted.

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MARCH, 1967.

*In lieu of the Solicitor General, who has disqualified himself.

APPENDIX

Constitution of the United States—Article IV:

> Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

28 U.S.C.:

> Section 1738. State and Territorial statutes and judicial proceedings; full faith and credit.
>
> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory, or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory, or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

(a) *Allowance of Marital Deduction.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) *Limitation in the Case of Life Estate or Other Terminable Interest.*—

* * * * *

(4) *Valuation of interest passing to surviving spouse.*—In determining for purposes of subsection (a) the value of any interest in property passing to the surviving spouse for which a deduction is allowed by this section—

(A) there shall be taken into account the effect which the tax imposed by section 2001, or any estate, succession, legacy, or inheritance tax, has on the net value to the surviving spouse of such interest; and

(B) where such interest or property is encumbered in any manner, or where the surviving spouse incurs any obligation imposed by the decedent with respect to the passing of such interest, such encumbrance or obligation shall be taken into account in the same manner as if the amount of a gift to such spouse of such interest were being determined.

(c) *Limitation on Aggregate of Deductions.*—

(1) *General rule.*—The aggregate amount of the deductions allowed under this section (computed without regard to this subsection) shall

not exceed 50 percent of the value of the adjusted gross estate, as defined in paragraph (2).

* * * * *

II General Statues of Connecticut, Revision of 1958 (Rev. 1964):

Sec. 12–401. Proration of estate taxes. Procedure. (a) When it appears from any adminstration account, or in any appropriate proceeding in the probate court that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity has paid a death tax levied or assessed under the provisions of chapter 217, hereinafter called the Connecticut estate tax, or under the provisions of the United States internal revenue code or under any death tax law of the United States hereafter enacted, hereinafter called the federal estate tax, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except when a testator otherwise directs in his will or when, by written instrument executed inter vivos, direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such inter vivos instrument, shall, except as hereinafter provided in subsection (b), be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such proration shall be made in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate, except that, in making such proration, allowances shall be made for any exemptions granted by the act, imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate and except that, in cases where a trust is

created or other provision made whereby any person is given an interest in income or an estate for years or for life or other temporary interest in any property or fund, the tax on both such temporary interest and the remainder thereafter shall be charged against and paid out of the corpus of such property or fund without apportionment between remainders and temporary estates. * * *

Treasury Regulations on Income Tax (26 C.F.R.):

SEC. 20.2053–1. *Deductions for expenses, indebtedness, and taxes; in general.*

* * * * * *

(b)(2) *Effect of court decree.* The decision of a local court as to the amount and allowability under local law of a claim or administration expense will ordinarily be accepted if the court passes upon the facts upon which deductibility depends. If the court does not pass upon those facts, its decree will, of course, not be followed: For example, if the question before the court is whether a claim should be allowed, the decree allowing it will ordinarily be accepted as establishing the validity and amount of the claim. However, the decree will not necessarily be accepted even though it purports to decide the facts upon which deductibility depends. It must appear that the court actually passed upon the merits of the claim. This will be presumed in all cases of an active and genuine contest. If the result reached appears to be unreasonable, this is some evidence that there was not such a contest, but it may be rebutted by proof to the contrary. If the decree was rendered by consent, it will be accepted, provided the consent was a bona fide recognition of the validity of the claim (and not a mere cloak for a gift) and was accepted by the court as satisfactory evidence upon the merits. It will be presumed that the consent was of this character, and was so accepted, if given by all

parties having an interest adverse to the claimant. The decree will not be accepted if it is at variance with the law of the State; as, for example, an allowance made to an executor in excess of that prescribed by statute. On the other hand, a deduction for the amount of a bona fide indebtedness of the decedent, or of a reasonable expense of administration, will not be denied because no court decree has been entered if the amount would be allowable under local law.

* * * * *

§ 20.2056(b)–4 *Marital deduction; valuation of interest passing to surviving spouse.*

(a) *In general.* The value, for the purpose of the marital deduction, of any deductible interest which passed from the decedent to his surviving spouse is to be determined as of the date of the decedent's death, except that if the executor elects the alternate valuation method under section 2032 the valuation is to be determined as of the date of the decedent's death but with the adjustment described in paragraph (a)(3) of § 20.2032–1. The marital deduction may be taken only with respect to the net value of any deductible interest which passed from the decedent to his surviving spouse, the same principles being applicable as if the amount of a gift to the spouse were being determined. * * *

* * * * *

(c) *Effect of death taxes.* (1) In the determination of the value of any property interest which passed from the decedent to his surviving spouse, there must be taken into account the effect which the Federal estate tax, or any estate, succession, legacy, or inheritance tax, has upon the net value of the surviving spouse of the property interest.

* * * * *

§ 20.2056(e)–2. *Marital deduction; definition of "passed from the decedent to his surviving spouse."*

* * * * *

(d) *Will contests.* * * *

(2) If as a result of the controversy involving the decedent's will, or involving any bequest or devise thereunder, a property interest is assigned or surrendered to the surviving spouse, the interest so acquired will be regarded as having "passed from the decedent to his surviving spouse" only if the assignment or surrender was a bona fide recognition of enforceable rights of the surviving spouse in the decedent's estate. Such a bona fide recognition will be presumed where the assignment or surrender was pursuant to a decision of a local court upon the merits in an adversary proceeding following a genuine and active contest. However, such a decree will be accepted only to the extent that the court passed upon the facts upon which deductibility of the property interests depends. If the assignment or surrender was pursuant to a decree rendered by consent, or pursuant to an agreement not to contest the will or not to probate the will, it will not necessarily be accepted as a bona fide evaluation of the rights of the spouse.

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 240

THE SECOND NATIONAL BANK OF NEW HAVEN,
Executor of the Will of FREDERICK F. BREWSTER, late of Hamden, Deceased,

Petitioner,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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The government asserts at pages 6 and 12 of its brief that Connecticut does not regard a probate decree as binding on the State's own taxing authorities. This statement is wholly wrong. The succession tax, the principal death duty in the State is always determined in and fixed by a decree of the probate court unless taken to an appellate court by the Tax Commissioner or a beneficiary or a fiduciary of the estate. *Emanuelson* v. *Sullivan*, 147 Conn. 406 cited by the government involved a probate decree fixing a tax from which an appeal was taken. The judgment of the appellate court of course controlled. In no sense does the decision deal with the conclusive effect a probate decree has upon the tax authorities. They, as well as everyone else, in the absence of fraud are bound by Section 45-9 General Statutes which appears in the appendix to our initial brief at page 13(a).

Now, the government stakes the outcome of this case upon the claim that the probate decree fixing the amount of the widow's share was non-adversary in nature. A far better rule, we submit, would be to make it turn upon whether it was an honest adjudication of the property rights of the beneficiaries. Indeed, anything less than that, we believe, would be a species of fraud sufficient to destroy the effectiveness of the decree so far as third parties are concerned. Such a rule as we shall demonstrate would have the additional virtue of conforming to earlier decisions of this court.

The decree of the Probate Court was not erroneous. Parenthetically we point out that the guardian ad litem, the Probate Judge and the District Judge, all highly capable Connecticut lawyers and experienced in its probate law, saw eye to eye on the question of Connecticut law. The panel of judges in the Court of Appeals, despite their elevated position had not had the benefit of great experience in Connecticut law.

Also the decree of the Probate Court was an honest adjudication of the property rights of the beneficiaries of the estate. The principal participants in the proceeding, the executors and their counsel, the guardian ad litem and the Probate Judge were, of course, conscious of the effect that the amount of the property passing into the widow's marital trust would have on the federal estate tax. That lesson is taught in *Jerome* v. *Jerome*, 139 Conn. 285. They were also aware that a determination of the rights of the beneficiaries under the Connecticut apportionment statute was an essential step in the settlement of the estate; and further that the only court that had jurisdiction to adjudge that matter was the Probate Court in Hamden, unless, of course, an appeal should be taken. The executors knew too that under Sec. 12–401(b) of the General Statutes, it was their express obligation to initiate a proceeding in the

Probate Court and to submit "a computation of the proposed proration." The guardian ad litem was surely aware of his obligations to the minor grandchildren and unknown remaindermen to advance claims on their behalf only when he believed them justified. The Probate Judge knew that he had to make an intelligent and honest adjudication of the property rights of the beneficiaries under Connecticut law and it is manifest from his memorandum that he did so and that he knew the financial effect of any decision he might make.

It is unfortunate that the Internal Revenue Service chose to ignore the notice of the hearing given to it.

The proceeding was truly adversary in the sense that the property interests of the widow and grandchildren were adverse and the Court weighed their merits. The executors having initiated the proceeding and made their own decision as to what Connecticut law required were, of course, under an obligation to explain their position to the Court; but having done that they were obviously not even entitled to argue for or against any beneficiary. Regardless of what the Probate Court decided, the executors we do not believe were "aggrieved" persons entitled to appeal. Doubtless the widow and the adult grandchildren were not anxious to litigate against each other and were content to accept an honest judgment by a capable judge fixing their rights.

All these things are implicit and manifest in the record here and when the government characterizes the proceeding "as an effort to avoid estate taxes," it (U. S. Brief p. 20) is wholly wrong and exceedingly unfair; it stigmatizes the guardian ad litem and the Probate Judge and it overlooks the fact that the Federal District Judge agreed with them.

Years ago this Court adopted an approach to the determination of the bnding effect of state court decrees in federal tax proceedings. In *Uterhart* v. *United States* (1916), 240 U.S. 598, in holding the judgment of a New York trial court binding on the meaning of a will, it said at page 603:

> "* * * The right to succeed to the property of the decedent depends upon and is regulated by state law. * * *, and it is obvious that a judicial construction of the will by a court of competent jurisdiction determines not only legally but practically the extent and character of the interests taken by the legatees."

In *Freuler* v. *Helvering* (1934) 291 U.S. 35, this Court again held the decree of a California trial court adjudicating the property rights of beneficiaries respecting distribution of a trust estate was to be binding in the federal tax proceeding before it. It said, too, that the proceeding in the California court was not collusive "in the sense that all parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax." The Court's decision as to lack of collusion was based upon:

> "* * * The case appears to have been initiated by the filing of a trustee's account, in the usual way. Notice was given to the interested parties. Objections to the account were presented, and the matter came on for hearing in due course, all parties being represented by counsel. The decree purports to decide issues regularly submitted and not to be in any sense a consent decree. * * *"

Three years later this Court reaffirmed the position adopted in *Freuler* by holding, in *Blair* v. *Commissioner* (1937), 300 U.S. 5, that the decision of an Illinois trial court determining the nature and extent of the interest of

the beneficiary of a trust and his power to assign that interest was binding in the federal tax proceeding before it. That the Illinois suit was collusive was denied on the authority of *Freuler*.

Three years later this Court again made the distinction between state and federal jurisdiction very clear.

> "State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed. * * *"
>
> *Morgan* v. *Commissioner* (1940), 309 U.S. 78, 80.

These decisions clearly established that the decree of a state court determining property rights is conclusive in a federal tax proceeding unless that decree was obtained by collusion. Therefore, we suggest that pragmatic or policy considerations which are claimed to call for the adoption of a non-adversary rule as advocated by the government are completely irrelevant to this case. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 is likewise inapplicable as pointed out by the majority in the *Bosch* case.

In both *Freuler* and *Blair* this Court denied that there was collusion in the state court proceeding. The essential inquiry in such a case is—what collusion will vitiate the state court decree? Alternatively, the inquiry is—does the collusion which prevents a state court decree from being conclusive in a federal tax proceeding differ from the collusion which invalidates the decree of any court? In the ordinary dictionary definition "collusion" means "deceit", "fraud" or "connivance". *Webster's New International Dictionary.* Such also was this Court's view of collusion in *Dickerman* v. *Northern Trust Co.* (1900), 176 U. S. 181. At page 189, this Court said:

> "We have no doubt that this judgment was collusive in the sense that it was obtained by the plaintiff and

consented to by the defendant company for the purpose of giving the trustees a legal excuse for declaring the principal and interest of the mortgage to be due, and to give authority for a foreclosure. But this did not constitute collusion in the sense of the law, nor does it meet the exigencies of the petitioners' case. Collusion is defined by Bouvier as 'an agreement between two or more persons to defraud a person of his rights by the forms of law, or, to obtain an object forbidden by law,' and in similar terms by other dictionarians. It implies the existence of fraud of some kind, the employment of fraudulent means, or lawful means for the accomplishment of an unlawful purpose; but if the action be founded upon a just judgment, and be conducted according to the forms of law and with a due regard to the rights of parties, it is no defence that the plaintiff may have had some ulterior object in view beyond the recovery of a judgment, so long as such object was not an unlawful one. * * *"

Only by continuing to follow the rule of *Freuler* and *Blair* that actual collusion in the legal sense is required before the state court decision can be deprived of conclusive effect can a workable rule be established. The judgment of any court can be collaterally attacked only for fraud. Thus, in the absence of collusion or fraud, the property rights of parties as determined by a state court in an in rem proceeding are forever binding between them. Uniformity of enforcement of such rights between the parties and as against outsiders is obviously desirable. We believe that this is what this Court had in mind in *Blair* when it said at page 10:

"* * * In this instance, it is not necessary to go beyond the obvious point that the decision was in a suit between the trustees and the beneficiary and his

> assignees, and the decree which was entered in pursuance of the decision determined *as between these parties* the validity of the particular assignments." (Italics supplied)

See also *Darlington* v. *Commissioner* (C.A. 3), 302 F. 2d 693.

Whether a state court proceeding is adversary or non-adversary should be material only in determining whether there was actual collusion in that proceeding. If the government's use of "adversary" carries only the meaning of "having opposing or adverse interests" we cannot quarrel with it. The basic determination should be made by ascertaining whether in the state court proceeding the court had to decide between adverse property interests and its decree benefited one or more parties at the expense of the others. The Court of Appeals in *Gallagher* v. *Smith* (C.A. 3), 223 F.2d 218, expressed this position very clearly:

> "If the questions are fairly posed to the court and the tribunal is left free to decide them according to its own independent judgment it should not be necessary for the parties to take formal adversary positions and engage in legal shadow boxing in order that the judgment of the court should have conclusive effect, taxwise as well as propertywise."

A logical and practical approach along these same lines is given in Stephens and Freeland, *The Role of Local Law and Local Adjudications in Federal Tax Controversies* (1961), 46 Minnesota Law Review 223, 247:

> "We think a proper distillation of the variant expressions in the cases is that a state court decision of local issues germane to a federal tax controversy must be accorded full recognition by the tax tribunal if it is an adjudication of the local issues on the merits.

By this we mean that a federal judge requested to accord full recognition to a state court decision should consciously ask himself this question: Did the parties in the state proceeding invoke the function of the state judiciary in such a way that the state judge has actually gone about his usual business of interpreting state law in the light of facts fairly presented to reach and express a conclusion as to the interests and rights of the parties? If so, as the Supreme Court has said: 'To derogate from the authority of that conclusion and of the decree it commanded, so far as the question is one of state law, would be wholly unwarranted in the exercise of federal jurisdiction.' The question whether the state court decision is such as to compel full recognition is a federal question."

We respectfully submit that the judgment of the Court of Appeals should be reversed and that of the District Court affirmed.

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SUPREME COURT OF THE UNITED STATES

Nos. 673 AND 240.—OCTOBER TERM, 1966.

Commissioner of Internal Revenue, Petitioner, 673 *v.* Estate of Herman J. Bosch, Deceased. The Second National Bank of New Haven, Petitioner, 240 *v.* United States.	On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 5, 1967.]

MR. JUSTICE CLARK delivered the opinion of the Court.

These two federal estate tax cases present a common issue for our determination: Whether a federal court or agency in a federal estate tax controversy is conclusively bound by a state trial court adjudication of property rights or characterization of property interests when the United States is not made a party to such proceeding.

In No. 673, *Commissioner of Internal Revenue* v. *Estate of Bosch*, 363 F. 2d 1009, the Court of Appeals for the Second Circuit held that since the state trial court had "authoritatively determined" the rights of the parties, it was not required to delve into the correctness of that state court decree. In No. 240, *The Second National Bank of New Haven, Executor* v. *United States of America*, 351 F. 2d 489, another panel of the same Circuit held that the "decrees of the Connecticut Probate Court . . . under no circumstances can be construed as binding" on a federal court in subsequent litigation involving federal revenue laws. Whether these cases conflict in principle or not, which is disputed here, there

does exist a widespread conflict among the Circuits [1] over the question and we granted certiorari to resolve it. 385 U. S. 966, 968. We hold that where the federal estate tax liability turns upon the character of a property interest held and transferred by the decedent under state law, federal authorities are not bound by the determination made of such property interest by a state trial court.

I.

(a) No. 673, *C. I. R.* v. *Estate of Bosch.*

In 1930, decedent, a resident of New York, created a revocable trust which, as amended in 1931, provided that the income from the corpus was to be paid to his wife during her lifetime. The instrument also gave her a general power of appointment, in default of which it provided that half of the corpus was to go to his heirs and the remaining half was to go to those of his wife. In 1951 the wife executed an instrument purporting to release the general power of appointment and convert it into a special power. Upon decedent's death in 1957, respondent, in paying federal estate taxes, claimed a marital deduction for the value of the widow's trust. The Commissioner determined, however, that the trust corpus did not qualify for the deduction under § 2056 (b)(5)[2] of the 1954 Internal Revenue Code and

[1] Illustrative of the conflict among the Circuits are: *Gallagher* v. *Smith*, 223 F. 2d 218 (C. A. 3d Cir., 1955); *Faulkerson's Estate* v. *United States*, 301 F. 2d 231 (C. A. 7th Cir.), cert. denied, 371 U. S. 887 (1962); *Pierpont* v. *C. I. R.*, 336 F. 2d 277 (C. A. 4th Cir., 1964), cert. denied, 380 U. S. 908 (1965).

[2] Section 2056 (b)(5) of the Internal Revenue Code of 1954, 26 U. S. C. § 2056 (b)(5), provides:

"(5) *Life estate with power of appointment in surviving spouse.*— In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, . . . with power in the surviving spouse to appoint the entire interest, . . . (exercisable in favor of such sur-

levied a deficiency. Respondent then filed a petition for redetermination in the Tax Court. The ultimate outcome of the controversy hinged on whether the release executed by Mrs. Bosch in 1951 was invalid—as she claimed it to be—in which case she would have enjoyed a general power of appointment at her husband's death and the trust would therefore qualify for the marital deduction. While the Tax Court proceeding was pending, the respondent filed a petition in the Supreme Court of New York for settlement of the trustee's account; it also sought a determination as to the validity of the release under state law. The Tax Court, with the Commissioner's consent, abstained from making its decision pending the outcome of the state court action. The state court found the release to be a nullity; the Tax Court then accepted the state court judgment as being an "authoritative exposition of New York law and adjudication of the property rights involved," 43 T. C. 120, 124, and permitted the deduction. On appeal to the Court of Appeals, that court affirmed by a divided court. It held that "the issue is . . . not whether the federal court is 'bound by' the decision of the state tribunal, but whether or not a state tribunal has authoritatively determined

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viving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

"(A) the interest . . . thereof so passing, shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

"(b) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

"This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events."

the rights under state law of a party to the federal action." 363 F. 2d, at 1013. The court concluded that the "New York judgment, rendered by a court, which had jurisdiction over parties and subject matter, authoritatively settled the rights of the parties, not only for New York, but also for purposes of the application to those rights of the relevant provisions of federal tax law." *Id.*, at 1014. It declared that since the state courts had held the wife to have a general power of appointment under its law, the corpus of the trust qualified for the marital deduction. We do not agree and reverse.

(b) No. 240, *The Second National Bank of New Haven, Executor* v. *United States.*

Petitioner in this case is the executor of the will of one Brewster, a resident of Connecticut who died in September of 1958. The decedent's will, together with a codicil thereto, was admitted to probate by the Probate Court for the District of Hamden, Connecticut. The will was executed in 1958 and directed the payment "out of my estate my just debts and funeral expenses and any death taxes which may be legally assessed. . . ." It further directed that the "provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries of this will or the transferees of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate." The will also provided for certain bequests and left the residue in trust; one-third of the income from such trust was to be given to decedent's wife for life, and the other two-thirds for the benefit of his grandchildren that were living at the time of his death. In July of 1958, the decedent executed a codicil to his will, the pertinent part of which gave his wife a general testamentary power of appointment over the corpus of the trust pro-

vided for her. This qualified it for the marital deduction as provided by the Internal Revenue Code of 1954, § 2056 (b)(5). In the federal estate tax return filed in 1959, the widow's trust was claimed as part of the marital deduction and that was computed as one-third of the residue of the estate before the payment of federal estate taxes. It was then deducted, along with other deductions not involved here, from the total value of the estate and the estate tax was then computed on the basis of the balance. The Commissioner disallowed the claimed deduction and levied a deficiency which was based on the denial of the widow's allowance as part of the marital deduction and the reduction of the marital deduction for the widow's trust, by requiring that the estate tax be charged to the full estate prior to the deduction of the widow's trust. After receipt of the deficiency notice, the petitioner filed an application in the state probate court to determine, under state law, the proration of the federal estate taxes paid. Notice of such proceeding was given all interested parties and the District Director of Internal Revenue. The guardian *ad litem* for the minor grandchildren filed a verified report stating that there was no legal objection to the proration of the federal estate tax as set out in the application of the executor. Neither the adult grandchildren nor the District Director of Internal Revenue filed or appeared in the Probate Court. The court then approved the application, found that the decedent's will did not negate the application of the state proration statute and ordered that the entire federal tax be prorated and charged against the grandchildren's trusts. This interpretation allowed the widow a marital deduction of some $3,600,000 clear of all federal estate tax. The Commissioner, however, subsequently concluded that the ruling of the Probate Court was erroneous, not binding on him and

assessed a deficiency. After payment of the deficiency, petitioner brought this suit in the United States District Court for a refund. On petitioner's motion for summary judgment, the Government claimed that there was a genuine issue of material fact, *i. e.*, whether the probate proceedings had been adversary in nature. The District Court held that the "decrees of the Connecticut Probate Court . . . under no circumstances can be construed as binding and conclusive upon a federal court in construing and applying the federal revenue laws." 222 F. Supp. 446, 457. The court went on to hold that under the standard applied by the state courts, there was no "clear and unambiguous direction against proration," and that therefore the state proration statute applied. *Id.*, at 454. The Court of Appeals reversed, holding that the decedent's will "would seem to be clear and unambiguous to the effect that taxes were to come out of his residual estate and that despite any contrary statute the testator specifically wished to avoid any proration." 351 F. 2d, at 491. It agreed with the District Court that, in any event, the judgment of the State Probate Court was not binding on the federal court.

II.

Petitioner in No. 240 raises the additional point that the Court of Appeals was incorrect in holding that decedent's will clearly negated the application of the state proration statute. While we did not limit the grant of certiorari, we affirm without discussion, the holding of the Court of Appeals on the point. The issue presents solely a question of state law and "[w]e ordinarily accept the determination of local law by the Court of Appeals . . . and we will not disturb it here." *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530, 534 (1949); *General Box Co.* v. *United States*, 351 U. S. 159, 165 (1956); *The Tungus* v. *Skovaard*, 358 U. S. 588, 596

(1959). The Court of Appeals did not pass on the correctness of the resolution of the state law problem involved in *Bosch*, No. 673, and it is remanded for that purpose.

III.

The problem of what effect must be given a state trial court decree where the matter decided there is determinative of federal estate tax consequences has long burdened the Bar and the courts. This Court has not addressed itself to the problem for nearly a third of a century.[3] In *Freuler* v. *Helvering*, 291 U. S. 35 (1934), this Court, declining to find collusion between the parties on the record as presented there, held that a prior *in personam* judgment in the state court to which the United States was not made a party, "[o]bviously . . . had not the effect of *res judicata*, and could not furnish the basis for invocation of the full faith and credit clause . . . ." At 43. In *Freuler's* wake, at least three positions have emerged among the Circuits. The first of these holds that

> ". . . if the question at issue is fairly presented to the state court for its independent decision and is so decided by the court the resulting judgment if binding upon the parties under the state law is conclusive as to their property rights in the federal tax case. . . ." *Gallagher* v. *Smith*, *supra*, at 225.

The opposite view is expressed in *Faulkerson's Estate* v. *United States*, *supra*. This view seems to approach that of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), in that the federal court will consider itself bound by the state court decree only after independent examination of the

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[3] It may be claimed that *Blair* v. *Commissioner*, 300 U. S. 5 (1937), dealt with the problem presently before us but that case involved the question of the effect of a property right determination by a state appellate court.

state law as determined by the highest court of the State. The Government urges that an intermediate position be adopted; it suggests that a state trial court adjudication is binding in such cases only when the judgment is the result of an adversary proceeding in the state court. *Pierpont v. C. I. R., supra.* Also see the dissent of Friendly, J., in *Bosch,* No. 673.

We look at the problem differently. First, the Commissioner was not made a party to either of the proceedings here and neither had the effect of *res judicata, Freuler* v. *Helvering, supra,* nor did the principle of collateral estoppel apply. It can hardly be denied that both state proceedings were brought for the purpose of directly affecting federal estate tax liability. Next, it must be remembered that it was a federal taxing statute that the Congress enacted and upon which we are here passing. Therefore, in construing it, we must look to the legislative history surrounding it. We find that the report of the Senate Finance Committee recommending enactment of the marital deduction used very guarded langauge in referring to the very question involved here. It said that "proper regard," not finality, "should be given to interpretation of the will" by state courts and then only when entered by a court "in a bona fide adversary proceeding." S. Rep. No. 1013, Pt. 2, 80th Cong., 2d Sess., p. 4. We cannot say that the authors of this directive intended that the decrees of state trial courts were to be conclusive and binding on the computation of the federal estate tax as levied by the Congress. If the Congress had intended state trial court determinations to have that effect on the federal actions, it certainly would have said so—which it did not do. On the contrary, we believe it intended the marital deduction to be strictly construed and applied. Not only did it indicate that only "proper regard" was to be accorded state decrees but it placed specific limitations on the

allowance of the deduction as set out in §§ 2056 (b), (c), and (d). These restrictive limitations clearly indicate the great care that Congress exercised in the drawing of the Act and indicate also a definite concern with the elimination of loopholes and escape hatches that might jeopardize the federal revenue. This also is in keeping with the long-established policy of the Congress, as expressed in the Rules of Decision Act, 28 U. S. C. § 1652. There it is provided that in the absence of federal requirements such as the Constitution or Acts of Congress, the "laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." This Court has held that judicial decisions are "laws of the . . . state" within the section. *Erie R. Co.* v. *Tompkins, supra; Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (1949); *King* v. *Order of Travelers*, 333 U. S. 153 (1948). Moreover, even in diversity cases this Court has further held that while the decrees of "lower state courts" should be "attributed some weight . . . the decision [is] not controlling . . ." where the highest court of the State has not spoken on the point. *King* v. *Order of Travelers, supra*, at 161. And in *West* v. *A. T. & T. Co.*, 311 U. S. 223 (1940), this Court further held that "an intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court *unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.*" At 237. Thus, under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling. It follows here then, that when the application of a federal statute is involved, the decision of a state trial court as to an underlying issue of state law should *a fortiori* not be controlling. This is but an application of the rule of *Erie R. Co.* v. *Tompkins, supra*, where state law as

announced by the highest court of the State is to be followed. This is not a diversity case but the same principle may be applied for the same reasons, *viz.*, the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. If there be no decision by that court then federal authority must apply what it finds to be the state law after giving "proper regard" to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court. *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1955).

We believe that this would avoid much of the uncertainty that would result from the "non-adversary" approach and at the same time would be fair to the taxpayer and protect the federal revenue as well.

The judgment in No. 240 is therefore affirmed while that in No. 673 is reversed and remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 673 AND 240.—OCTOBER TERM, 1966.

Commissioner of Internal Revenue, Petitioner, v. Estate of Herman J. Bosch, Deceased.	On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.
673	
The Second National Bank of New Haven, Petitioner, v. United States.	
240	

[June 5, 1967.]

MR. JUSTICE DOUGLAS, dissenting.

As the Court says, the issue in these cases is not whether the Commissioner is "bound" by the state court decrees. He was not a party to the state court proceedings and therefore cannot be bound in the sense of *res judicata*. The question simply is whether, absent fraud or collusion, a federal court can ignore a state court judgment when federal taxation depends upon property rights and when property rights rest on state law, as they do here.

Since our 1938 decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, an unbroken line of cases was held that the federal courts must look to state legislation, state decisions, state administrative practice, for the state law that is to be applied. See, *e. g.*, *Cities Service Oil Co.* v. *Dunlop*, 308 U. S. 208; *Bernhardt* v. *Polygraphic Co. of America*, 350 U. S. 198. Those were diversity cases; and in them we have never suggested that the federal court may ignore a relevant state court decision because it was not entered by the highest state court. Indeed, we have held that the federal court is obligated to follow the

decision of a lower state court in the absence of decisions of the State Supreme Court showing that the state law is other than announced by the lower court. See, *e. g.*, *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223; *Six Companies of California* v. *Joint Highway District*, 311 U. S. 180; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464.

It is true that in *King* v. *Order of Travelers*, 333 U. S. 153, we held that a federal court of appeals did not have to accept the decision of a state court of common pleas on a matter of state law. But that case was unique. The state court had relied upon the decision of a federal district court; the "Court of Common Pleas [did] not appear to have such importance and competence within [the State's] own judicial system that its decisions should be taken as authoritive expositions of that State's law" (*id.*, at 161); "the difficulty of locating Common Pleas [was] a matter of great practical significance" (*ibid.*); another state court had handed down an opinion rejecting the reasoning of the court of common pleas and espousing the reasoning of the Court of Appeals, illustrating "the perils of interpreting a Common Pleas decision as a definitive expression of [state law]" (333 U. S., at 162); and the interpretation of the Court of Appeals, which rejected the decision of the court of common pleas, was strongly supported by the decisions of the State Supreme Court. We stressed that "our decision is not be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts." *Ibid.*

Even before it was held that federal courts must apply state law in diversity cases, it was incumbent upon federal courts to take state law from state court decisions when federal tax consequences turned on state law. In *Freuler* v. *Helvering*, 291 U. S. 35, the trustee under a decedent's will had included in income distributed to

the life beneficiaries amounts representing depreciation of the corpus. The life beneficiaries did not include the amounts constituting depreciation and the Commissioner asserted a deficiency. While the case was on appeal to the Board of Tax Appeals, the trustee filed an accounting in the state probate court, requesting its approval. The state court held that the life beneficiaries were not entitled to the distribution of depreciation of the corpus, and ordered that the life beneficiaries repay the trustee for the amount improperly distributed to them. In the tax litigation, the Court of Appeals ignored the state court determination on the ground that "no orders of the probate court, the effect of which would relate to what are deductions to be allowed under the national income taxing law, are conclusive and binding on the federal courts. . . ." 62 F. 2d 733, 735. The Court reversed, holding that the probate court order was an order governing distribution within § 219 of the Revenue Act of 1921. It went on to say:

> "Moreover, the decision of [the probate] court, until reversed or overruled, establishes the law of California respecting distribution of the trust estate. It is none the less a declaration of the law of the State because not based on a statute, or earlier decisions. The rights of the beneficiaries are property rights and the court has adjudicated them. What the law as announced by that court adjudges distributable is, we think, to be considered in applying § 219 of the Act of 1921." 291 U. S., at 45.

The issue of the effect of a state court determination came up again in *Blair* v. *Commissioner*, 300 U. S. 5. The issue in that case was whether a beneficiary had effectively assigned income from a trust. In prior tax litigation, a federal court held that the trust was a spendthrift trust and that, therefore, the assignments were

invalid and the income taxable to the beneficiary. The trustees then brought an action in the state court; the state courts determined that the trust was not a spendthrift trust and that the assignments were valid. The Board of Tax Appeals accepted the decision of the state court and rejected the Commissioner's claim that petitioner was liable for tax on the income. The Court rejected the Commissioner's argument that the trust was a spendthrift trust, noting that:

> "The question of the validity of the assignment is a question of local law. . . . By that law the character of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign that interest in whole or in part, are to be determined. The decision of the state court upon these questions is final. . . . It matters not that the decision was by an intermediate appellate court. . . . In this instance, it is not necessary to go beyond the obvious point that the decision was in a suit between the trustees and the beneficiary and his assignees, and the decree which was entered in pursuance of the decision determined as between these parties the validity of the particular assignments. Nor is there any basis for a charge that the suit was collusive and the decree inoperative. . . . The trustees were entitled to seek the instructions of the court having supervision of the trust. That court entertained the suit and the appellate court, with the first decision of the Circuit Court of Appeals before it, reviewed the decisions of the Supreme Court of the State and reached a deliberate conclusion. To derogate from the authority of that conclusion and of the decree it commanded, so far as the question is one of state law, would be wholly unwarranted in the exercise of federal jurisdiction.

> "In the face of this ruling of the state court it is not open to the Government to argue that the trust 'was, under the [State] law, a spendthrift trust.' The point of the argument is that, the trust being of that character, the state law barred the voluntary alienation by the beneficiary of his interest. The state court held precisely the contrary." *Id.*, 9–10.

I would adhere to *Freuler* v. *Helvering*, *supra*, and *Blair* v. *Commissioner*, *supra*. There was no indication in those cases that the state court decision would not be followed if it was not from the highest state court.

The idea that these state proceedings are not to be respected reflects the premise that such proceedings are brought solely to avoid federal taxes. But there are some instances in which an adversary proceeding is impossible (see, *e. g.*, *Estate of Darlington* v. *Commissioner*, 302 F. 2d 693; Braverman & Gerson, The Conclusiveness of State Court Decrees in Federal Tax Litigation, 17 Tax L. Rev. 545, 570–572 (1962)), and many instances in which the parties desire a determination of their rights for other than tax reasons.

Not giving effect to a state court determination may be unfair to the taxpayer and is contrary to the congressional purpose of making federal tax consequences depend upon rights under state law. The result will be to tax the taxpayer or his estate for benefits which he does not have under state law. This aspect is emphasized in *Blair* v. *Commissioner*, *supra*, where the Government attempted to tax the taxpayer for income to which he had no right under state law. In *Second National Bank* v. *United States*, the grandchildren's trust will be assessed for the estate taxes, since the state court held that the proration statute applied; but the estate tax will be computed as if the proration statute did not apply—the marital deduction will be

decreased and the tax increased. Or take the case where a state court determines that X does not own a house. After X dies, a federal court determines that the state court was wrong and that X owned the house, and it must be included in his gross estate even though it does not pass to his heirs. I cannot believe that Congress intended such unjust results.

This is not to say that a federal court is bound by all state court decrees. A federal court might not be bound by a consent decree, for it does not purport to be a declaration of state law; it may be merely a judicial stamp placed upon the parties' contractual settlement. Nor need the federal court defer to a state court decree which has been obtained by fraud or collusion. But where, absent those considerations, a state court has reached a deliberate conclusion, where it has construed state law, the federal court should consider the decision to be an exposition of the controlling state law and give it effect as such.

SUPREME COURT OF THE UNITED STATES

Nos. 673 AND 240.—OCTOBER TERM, 1966.

Commissioner of Internal Revenue, Petitioner, 673 v. Estate of Herman J. Bosch, Deceased.	On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.
The Second National Bank of New Haven, Petitioner, 240 v. United States.	

[June 5, 1967.]

MR. JUSTICE HARLAN, whom MR. JUSTICE FORTAS joins, dissenting.

The central issue presented by these two cases is whether and in what circumstances a judgment of a lower state court is entitled to conclusiveness in a subsequent federal proceeding, if the state judgment establishes property rights from which stem federal tax consequences. The issue is doubly important: it is a difficult and intensely practical problem, and it involves basic questions of the proper relationship in this context between the state and federal judicial systems. For reasons which follow, I am constrained to dissent from the resolution reached by the Court in both cases.

I.

It is useful first to summarize the legal and factual circumstances out of which these cases arose.

In No. 240, *Second National Bank*, the decedent's will and codicil provided that one-third of the residuary estate should be held in trust for the decedent's widow, who was given a general testamentory power of appointment over the corpus, and that the balance should be

held in separate trusts for his nine grandchildren. The widow's trust was plainly within the terms of the marital deduction provided by § 2056 (b)(5) of the Internal Revenue Code of 1954; the issue in this instance thus simply involves determination of the amount of this trust, and hence the amount of the marital deduction. Under Connecticut's tax-proration statute, Conn. Rev. Gen. Stat. § 12–401, a bequest exempt from estate tax, as here by reason of the federal marital deduction, is not reduced by any portion of such tax. Accordingly, if the proration statute is applicable to this decedent's will, the widow's trust would bear no part of the federal estate tax, and its entire burden would instead fall upon the grandchildren's trusts. The amount of the marital deduction would be correspondingly increased.

By its terms, the state proration statute is to be applied unless the "testator otherwise directs." Article I of the decedent's will provided, without apparent ambiguity, that the "provisions of any statute requiring the apportionment or proration of [estate] taxes . . . shall be without effect in the settlement of my estate." Nonetheless, the executor, petitioner here, contended to the Commissioner that the statute was applicable, and, upon receipt of the 30-day deficiency letter,[1] applied to the Probate Court for the District of Hamden, Connecticut, for a determination that the estate taxes should be apportioned under the terms of the state statute. Notice of the application was given to the District Director of Internal Revenue, but, in accord with the Service's con-

[1] The deficiency was assessed at $1,333,194.35, plus interest. If the proration statute is applicable, as the executor has contended, the marital deduction attributable to the widow's trust would be approximately $3,600,000. If the statute is not applicable, as the Commissioner has held, the marital deduction would be approximately $1,700,000.

sistent position with reference to such state proceedings, Mim. 6134 (1947), no appearance was entered in his behalf.

Apart from the executor's application, the probate court had the benefit only of argument from the guardian *ad litem* of the grandchildren; the guardian acknowledged that proration under the statute would place the burden of the estate tax entirely upon his wards' trusts, but nevertheless concluded that he had "no objection" to the executor's application. The court, filing a written opinion, determined that the decedent's disclaimer of the statute was ambiguous, and therefore concluded that the statute was applicable. Petitioner thereupon paid the assessed deficiency, and brought this suit for a refund. The District Court and the Court of Appeals both concluded that, because of the character of Connecticut's probate court system,[2] the state judgment was not conclusive of the applicability of the proration statute. 222 F. Supp. 446; 351 F. 2d 489.

In No. 673, *Estate of Bosch*, the decedent created in 1930 a revocable *inter vivos* trust in favor of his wife, which also granted to her a general testamentary power of appointment over the corpus. In 1951, the decedent's wife, in order to take advantage of the Powers of Appointment Act of 1951, 65 Stat. 91, executed an instrument which purportedly converted the general power into a special power of appointment. Upon the decedent's death in 1957, his executor sought a marital deduction for the amount of the *inter vivos* trust; under § 2056

[2] The District Court concluded that Connecticut probate courts are not courts of records (but see *Shelton* v. *Hadlock*, 62 Conn. 143, 25 A. 483, and 1 Locke & Kohn, Connecticut Probate Practice 30 (1951)), that its decrees are without legal effect in the State's higher courts, and that their decrees are also subject to collateral attack even in another probate district. 222 F. Supp. 446, 457; 351 F. 2d 489, 494.

(b)(5), the trust would qualify for the deduction only if the decedent's wife held at his death a general power of appointment over the corpus.

The Commissioner, on the basis of the release signed in 1951 by the widow, disallowed the deduction, but the executor sought from the Tax Court a redetermination of the resulting deficiency. While the Tax Court proceeding was still pending, the executor petitioned in the New York Supreme Court for a determination under state law of the validity of the 1951 release. The Tax Court, with the Commissioner's assent, temporarily suspended its proceeding. In the state court, each of the three parties—the trustee, the widow, and the guardian *ad litem* of an infant who was a possible beneficiary—contended that the release was a nullity. The state court adopted their unanimous view. The Tax Court thereupon accepted the state trial court decision as an "authoritative exposition" of the requirements of state law. 43 T. C. 120. A divided Court of Appeals affirmed. 363 F. 2d 1009.

II.

The issue here, despite its importance in general, is essentially quite a narrow one. The questions of law upon which taxation turns in these cases are not among those for which federal definitions or standards have been provided; compare *Burnet* v. *Harmel*, 287 U. S. 103, 110; *Heiner* v. *Mellon*, 304 U. S. 271, 279; *Lyeth* v. *Hoey*, 305 U. S. 188, 194; it is, on the contrary, accepted that federal tax consequences have here been imposed by Congress on property rights as those rights have been defined and delimited by the pertinent state laws. The federal revenue interest thus consists entirely of the expectation that the absence or presence of the rights will be determined accurately in accordance with the prevailing state rules. The question here is, however, not how state law must in the context of federal taxation

ordinarily be determined; it is instead the more narrow one of whether and under what conditions a lower state court adjudication of a taxpayer's property rights is conclusive when subsequently the federal tax consequences of those rights are at issue in a federal court.

The problem may not, as the Court properly observes, be resolved by reference to the principles of *res judicata* or collateral estoppel, see generally *Cromwell* v. *County of Sac*, 4 Otto. 351, 352–353; the Revenue Service has not, and properly need not have, entered an appearance in either of the state court proceedings in question here. Nor do the pertinent provisions of the revenue laws, or their legislative history, provide an adequate guide to the solution of the problem; the only direct reference in that lengthy history relevant to these questions is imprecise and equivocal.[3] The cases in this Court are scarcely more revealing; they are, as Judge Friendly remarked below, "cryptic" and "rather dated." 363 F. 2d 1009, 1015.

It is, of course, plain that the Rules of Decision Act, 28 U. S. C. § 1652, is applicable here, as it is, by its terms, to any situation in which a federal court must ascertain and apply the law of any of the several States. Nor may it be doubted that the judgments of state courts must be accepted as a part of the state law to which the Act gives force in federal courts, *Erie R. Co.* v. *Tompkins*, 304 U. S. 64; it is not, for that purpose,

[3] A supplementary report of the Senate Finance Committee, concerned with the legislation which eventually became the Revenue Act of 1948, said simply that "proper regard should be given to interpretations of the will rendered by a court in a bona fide adversary proceeding." S. Rep. No. 1013, Part 2, 80th Cong., 2d Sess., 4. This language is doubtless broadly consistent with virtually any resolution of these issues, but it is difficult to see the pertinence of the sentence's last four words if, as the Court suggests, conclusiveness was intended to be given to the State's highest court, but to none other.

material whether the jurisdiction of the federal court in a particular case is founded upon diversity of citizenship or involves a question arising under the laws of the United States.[4] This need not mean, however, that every state judgment must be accepted by federal courts as conclusive of state law. The Court has, for example, never held, even in diversity cases, where the federal interest consists at most in affording a "neutral" forum, that the judgments of state trial courts must in all cases be taken as conclusive statements of state law;[5] apart from a series of cases decided at the 1940 Term,[6] the Court has consistently acknowledged that the character both of the state proceeding and of the state court itself may be relevant in determining a judgment's conclusiveness as a statement of state law.[7] This same result must

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[4] See, *e. g.*, *Materially Yours, Inc.* v. *Your Maternity Shop, Inc.*, 234 F. 2d 538; Friendly, In Praise of Erie—and of the New Federal Common Law, 39 N. Y. U. L. Rev. 383, 408n; Note, The Competence of Federal Courts to Formulate Rules of Decision, 77 Harv. L. Rev. 1084, 1087.

[5] See *King* v. *Order of United Commercial Travelers*, 333 U. S. 153. Compare *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 204, 209–211.

[6] *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *Six Companies of California* v. *Joint Highway District*, 311 U. S. 180; *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223; and *Stoner* v. *N. Y. Life Ins. Co.*, 311 U. S. 464. See also *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538. All these cases, with the possible exception of *Field*, and apart from the rather different issue in *Vandenbark*, concerned intermediate state courts. They have been strongly and repeatedly criticized by commentators. Judge Friendly, for example, described them as "outrages," *supra*, at 401. See also Corbin, The Laws of the Several States, 50 Yale L. J. 762, 766–768; Clark, State Law in the Federal Courts, 55 Yale L. J. 265, 290–292; and 2 Crosskey, Politics and the Constitution 922–927 (1953). It may also be wondered whether these cases have any vitality left after *King* and *Bernhardt*, *supra*.

[7] *Freuler* v. *Helvering*, 291 U. S. 35; *King* v. *Order of United Commercial Travelers*, *supra*; *Bernhardt* v. *Polygraphic Co.*, *supra*.

surely follow *a fortiori* in cases in which the application of a federal statute is at issue.

Similarly, it is difficult to see why the formula now ordinarily employed to determine state law in diversity cases—essentially that, absent a recent judgment of the State's highest court, state cases are only data from which the law must be derived—is necessarily applicable without modification in all situations in which federal courts must ascertain state law. The relationship between the state and federal judicial systems is simply too delicate and important to be reduced to any single standard. See Hill, The Erie Doctrine in Bankruptcy, 66 Harv. L. R. 1013; Note, The Competence of Federal Courts to Formulate Rules of Decision, *supra*. Compare, *e. g.*, *Morgan* v. *Commissioner*, 309 U. S. 78, 80–81; Cardozo, Federal Taxes and the Radiating Potencies of State Court Decisions, 51 Yale L. J. 783. The inadequacy of this formula is particularly patent here, where, unlike the cases in which it was derived, the federal court is confronted by precisely the legal and factual circumstances upon which the state court has already passed.

Accordingly, although the Rules of Decision Act and the *Erie* doctrine plainly offer relevant guidance to the appropriate result here, they can scarcely be said to demand any single conclusion.

III.

Given the inconclusiveness of these sources, it is essential to approach these questions in terms of the various state and federal interests fundamentally at stake. It suffices for present purposes simply to indicate the pertinent factors. On one side are certain of the principles which ultimately are the wellsprings both of the Rules of Decision Act and of the *Erie* doctrine. First among those is the expectation that scrupulous adherence by federal courts to the provisions of state law, as reflected both in local statutes and in state court

decisions, will promote an appropriate uniformity in the administration of law within each of the States. Uniformity will, in turn, assure proper regard in the federal courts for the areas of law left by the Constitution to state discretion and administration, and, in addition, will prevent the incongruity that stems from dissimilar treatment by state and federal courts of the same or similar factual situations. Finally, it must be acknowledged that state courts are unquestionably better positioned to measure the requirements of their own laws; even the lowest state court possesses the tangible advantage of a close familiarity with the meaning and purposes of its local rules of law.

On the other side are important obligations which spring from the practical exigencies of the administration of federal revenue statutes. It can scarcely be doubted that if conclusiveness for federal tax purposes were attributed to any lower state court decree, whether the product of genuinely adversary litigation or not, there would be many occasions on which taxpayers might readily obtain favorable, but entirely inaccurate, determinations of state law from unsuspecting state courts. One need not, to envision this hazard, assume either fraud by the parties or any lack of competence or disinterestedness among state judges; no more would be needed than a complex issue of law, a crowded calendar, and the presentation to a busy judge of but essentially a single viewpoint. The consequence of any such occurrence would be an explication of state law that would not necessarily be either a reasoned adjudication of the issues or a consistent application of the rules adopted by the State's appellate courts.

It is difficult to suppose that adherence by federal courts to such judgments would contribute materially to the uniformity of the administration of state law, or that the taxpayer would be unfairly treated if he were obliged

to act, for purposes of federal taxation, as if he were governed by a more accurate statement of the requirements of state law. Certainly it would contribute nothing to the uniformity or accuracy of the administration of the federal revenue statutes if federal courts were compelled to adhere in all cases to such judgments.[8]

IV.

The foregoing factors might, of course, be thought consistent with a variety of disparate resolutions of the questions these two cases present. If emphasis is placed principally upon the importance of uniformity in the application of law within each of the several States, and thereby upon the apparent unfairness to an individual taxpayer if an issue of state law were differently decided by state and federal courts, it might seem appropriate to accept, in all but the most exceptional of circumstances, the judgment of any state court that has addressed the question at issue. This is the viewpoint identified with the opinion of the Court of Appeals for the Third Circuit in *Gallagher* v. *Smith*, 223 F. 2d 218; it is, in addition, apparently the rule adopted today by my Brother DOUGLAS. Conversely, if emphasis is placed principally upon the hazards to the federal fisc from dubious decisions of lower state courts, it might be thought necessary to require federal courts to examine for themselves, absent a judgment by the State's highest court, the content in each case of the pertinent state law. This, as I understand it, is the rule adopted by a majority of the Court today.

In my opinion, neither of these positions satisfactorily reconciles the relevant factors involved. The former

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[8] See, on the importance of uniformity in federal taxation, *Hylton* v. *United States*, 3 Dall. 171, 180; Cahn, Local Law in Federal Taxation, 52 Yale L. J. 799.

would create excessive risks that federal taxation will be evaded through the acquisition of inadequately considered judgments from lower state courts, resulting from proceedings brought, in reality, not to resolve truly conflicting interests among the parties but rather as a predicate for gaining foreseeable tax advantages, and in which the point of view of the United States had never been presented or considered. The judgment resulting from such a proceeding might well differ only in form from a consent decree. The United States would be compelled either to accept as binding upon its interests such a judgment, or to participate in every state court proceeding, brought at the taxpayer's pleasure, which might establish state property rights with federal tax consequences.

The second position, on the other hand, would require federal intervention into the administration of state law far more frequently than the federal interests here demand; absent a judgment of the State's highest court, federal courts must under this rule re-examine and, if they deem it appropriate, disregard the previous judgment of a state court on precisely the identical question of state law. The result might be widely destructive both of the proper relationship between state and federal law and of the uniformity of the administration of law within a State.

The interests of the federal treasury are essentially narrow here; they are entirely satisfied if a considered judgment is obtained from either a state or a federal court, after consideration of the pertinent materials, of the requirements of state law. For this purpose, the Commissioner need not have, and does not now ask, an opportunity to relitigate in federal courts every issue of state law that may involve federal tax consequences; the federal interest requires only that the Commissioner be permitted to obtain from the federal courts a considered adjudication of the relevant state law issues in cases in

which, for whatever reason, the state courts have not already provided such an adjudication. In turn, it may properly be assumed that the state court has had an opportunity to make, and has made, such an adjudication if, in a proceeding untainted by fraud, it has had the benefit of reasoned argument from parties holding genuinely inconsistent interests.

I would therefore hold that in cases in which state-adjudicated property rights are contended to have federal tax consequences, federal courts must attribute conclusiveness to the judgment of a state court, of whatever level in the state procedural system, unless the litigation from which the judgment resulted does not bear the indicia of a genuinely adverary proceeding. I need not undertake to define with any particularity the weight I should give to the various possible factors involved in such an assessment; it suffices to illustrate the more important of the questions which I believe to be pertinent. The principal distinguishing characteristic of a state proceeding to which, in my view, conclusiveness should be attributed is less the number of parties represented before the state court than it is the actual adversity of their financial and other interests. It would certainly be pertinent if it appeared that all the parties had instituted the state proceeding solely for the purpose of defeating the federal revenue. The taking of an appeal would be significant, although scarcely determinative. The burden would be upon the taxpayer, in any case brought either for a redetermination of a deficiency or for a refund, to overturn the presumption, *Welch* v. *Helvering*, 290 U. S. 111, 115, that the Commissioner had correctly assessed the necessary tax by establishing that the state court had had an opportunity to make, and had made, a reasoned resolution of the state law issues, after a proceeding in which the pertinent viewpoints had been presented. Proceedings in which

one or more of the parties had been guilty of fraud in the presentation of the issues to the state court would, of course, ordinarily be entitled to little or no weight in the federal court's determination of state law.

I recognize, of course, that this approach lacks the precision of both the contrasting yardsticks suggested by the Court and by my Brother DOUGLAS. Yet I believe that it reflects more faithfully than either of those resolutions the demands of our federal system and of the competing interests involved.[9]

V.

I would apply these general principles to the present cases in the following manner. In No. 240, the Court of Appeals agreed with the District Court that "it was unnecessary" to make a finding on whether the proceedings in the Connecticut probate court were collusive or "non-adversary," since the decrees of the probate court could " 'under no circumstances' " be considered binding. 351 F. 2d 489, 494. I would therefore vacate the judgment of the Court of Appeals and remand the cause for further proceedings in accordance with the views expressed herein.

[9] It may be doubted, however, whether this approach would actually produce serious practical disadvantages. It is essentially the standard which has been embodied in the Treasury Regulations since 1919, see now Treas. Reg. §§ 20.2053–1(b) (2), 20.2056(e)–2(d) (2), and which was urged before this Court in these cases by counsel for the United States. It is, moreover, similar to the standards employed in various opinions by a number of the courts of appeals. See, *e. g.*, *Saulsbury* v. *United States*, 199 F. 2d 578; *Brodrick* v. *Gore*, 224 F. 2d 892; *In re Sweet's Estate*, 234 F. 2d 401; *Old Kent Bank & Trust Co.* v. *United States*, 362 F. 2d 444. See also Cahn, *supra*, at 818–819; Braverman & Gerson, The Conclusiveness of State Court Decrees in Federal Tax Litigation, 17 Tax L. R. 545. If any practical difficulties actually attend this standard, they have apparently not, despite its wide use, yet appeared.

In No. 673, the Court of Appeals apparently concluded that, absent fraud or collusion, any state court proceeding which terminates in a judgment binding on the parties as to their rights under state law is also conclusive for purposes of federal taxation. 363 F. 2d 1009, 1014. I would therefore reverse the judgment of the Court of Appeals, and again would remand the cause for further proceedings consistent with the views expressed in this opinion.

SUPREME COURT OF THE UNITED STATES

Nos. 673 AND 240.—OCTOBER TERM, 1966.

Commissioner of Internal Revenue, Petitioner, 673 *v.* Estate of Herman J. Bosch, Deceased.	On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.
The Second National Bank of New Haven, Petitioner, 240 *v.* United States.	

[June 5, 1967.]

MR. JUSTICE FORTAS, dissenting.

While I join the dissenting opinion of my Brother HARLAN, I believe it appropriate to add these few comments. As my Brother HARLAN states, in a case in which federal tax consequences depend upon state property interests, a federal court should accept the final conclusion of a competent state court, assuming that such a conclusion is an adjudication of substance arrived at after adversary litigation and on the basis of the same careful consideration that state courts normally accord cases involving the determination of state property interests. The touchstone of whether the state proceeding was "adversary" is not alone entirely satisfactory. I think that this concept has been helpfully embellished by Judge Raum of the United States Tax Court in the *Bosch* case, 43 T. C. 120, 123–124. Judge Raum suggests that among the factors to be considered in determining whether the decision of the state court is to be accepted as final for federal tax purposes are the following: whether the state court had jurisdiction, and whether its

determination is fully binding on the parties; whether, in practice, the decisions of the state court have precedential value throughout the State; whether the Commissioner was aware of the state proceedings and had an opportunity to participate; whether the state court "rendered a reasoned opinion and reached a 'deliberate conclusion', *Blair* v. *Commissioner*, 300 U. S. [5], at p. 10"; whether the state decision has potentially offsetting tax consequences in respect of the state court litigant's federal taxes; and, in general, whether the state court decision "authoritatively determined" future property rights, and thus, as Judge Raum stated, "provided more than a label for past events. . . ."